IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-314

OLLIE T. HILL, *et al.*, *Petitioners*,

v.

WESTERN ELECTRIC CO., INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of a divided panel of the United States Court of Appeals for the Fourth Circuit entered in this case on April 6, 1979.

OPINIONS BELOW

The opinion of the court of appeals is reported at 596 F.2d 99 and is reproduced in the Appendix at pp. 1a-25a.

The opinion of the district court on liability is not officially reported. It is unofficially reported at 12 Fair Employment Practice Cases ("FEP Cases") 1175. The opinion is reproduced in the Appendix at pp. 27a-44a.

Also reproduced in the Appendix are the findings of fact adopted by the district court (App. 44a-87a) and the district court's decree, as amended. App. 88a-105a. The findings of fact have not been reported. The original October 21, 1976 decree, but not the November 2, 1976 order amending the decree, is unofficially reported at 13 FEP Cases 1157.

JURISDICTION

The decision of the court of appeals was entered on April 6, 1979. App. 1a. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc* on May 29, 1979. App. 26a. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether this Court's decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977), mandates a *per se* rule that employee-plaintiffs in an employment discrimination suit may not under any circumstances represent rejected applicants for employment and seek relief on their behalf, even when the district court has found such representation to be appropriate and has awarded full and complete relief to applicants discriminatorily denied employment?

Whether the claims of a certified class must be dismissed if a named plaintiff does not prevail on the merits of his or her individual claim?

Whether plaintiffs in employment discrimination litigation, in order to make out a prima facie case, must carry the burden of proving what are appropriate and job-related selection criteria, even though the employer's failure to use any discernible criteria has resulted in a proven adverse impact on blacks and females?

Whether, in light of the "clearly erroneous" standard of review, a court of appeals may base its decision on factual assumptions which are contradicted by the findings of the district court, the stipulations of the parties, and the overwhelming weight of the evidence of record in the case?

STATUTES AND RULE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.,* and of Federal Rule of Civil Procedure 52(a) are reproduced in the Appendix at 106a.

STATEMENT OF THE CASE

The petitioners are black and female employees or former employees of the Arlington, Virginia facility of the Western Electric Company ("Western"). Following exhaustion of the administrative prerequisites to suit under Title VII, this case was filed as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, on May 14, 1975. On November 21, 1975, the district court certified the case as a class action and determined that the class should consist of:

> All black persons and all female persons who are, have been, or will be employed by Defendant at Defendant's facility in Arlington, Virginia, at any time since July 2, 1965; and all black persons and all female persons who have applied for employment at Defendant's facility in Arlington, Virginia, since July 2, 1965, or who will hereafter apply. App. 27a.

The case was tried to the Honorable Albert V. Bryan, Jr., United States District Judge for the Eastern District of Virginia on February 17-19, 1976. The trial record includes the testimony, either in court or by deposition, of 27 witnesses (including 7 experts), and more than 10,000 pages of exhibits. On April 30, 1976, the district court entered, in the words of Judge Lay's dissenting opinion below, "an exhaustive and analytical opinion," (App. 21a), adopted findings of fact, and directed the parties to present draft decrees. App. 27a-44a. The court entered its decree on October 21, 1976, and adopted amendments to that decree by order dated November 2, 1976.

The district court found that Western has discriminated against blacks and females in (i) hiring, (ii) job assignments, (iii) promotions from hourly rated to salaried jobs, and (iv) promotions from nonsupervisory to supervisory jobs.

With respect to hiring, the stipulations of the parties established gross disparities in hiring percentages for blacks compared to whites and for males compared to females.[1] Based on the evidence of record, the district

[1] a. Western hired only 12.7% of the black applicants for unskilled, entry-level service center jobs as compared to 29.8% of the white applicants;

b. Western hired only 17.9% of the black applicants for unskilled entry-level installer jobs as compared to 45.7% of the white applicants;

c. Western hired only 16.9% of the female applicants for unskilled entry-level service center jobs as compared to 26.8% of the male applicants;

d. Western never hired a female for an unskilled entry-level installer job. App. 31a-32a.

The district court found that these statistics

> demonstrate that black applicants have been rejected at a far higher rate than white applicants, and that female applicants have been rejected at a far higher rate than male applicants. . . . Consequently, Defendant's hiring practices have had an adverse impact on blacks and females. App. 49a.

court further made findings as to how those statistical disparities resulted from Western's hiring practices.[2]

With respect to promotions from hourly rated to salaried jobs, the statistics revealed that since July 2, 1965 only 9.8% of those promoted were black although 26.4% of those available for promotion were black, and only 11.9% of those promoted were female although 18.8% of those available for promotion were female. App. 69a, 71a. The district court found Western's promotion procedure to be standardless, vague and subjective, and reliant on the decisions of white male supervisors. App. 72a-73a.[3]

The statistics with respect to promotions from nonsupervisory to supervisory jobs since July 2, 1965 re-

[2] "The adverse impact of Defendant's hiring practices on blacks is caused by: (a) the personal interviews which Defendant requires each applicant to undergo . . . (b) Defendant's use of high school education as a criterion in hiring . . . and (c) Defendant's use of an applicant's scores on the pre-employment 'Installer's Test Battery' as [a criterion] in hiring. . . . The adverse impact of Defendant's hiring practices on females is caused by: (a) the personal interview . . . and (b) Defendant's policy of excluding females from employment as installers." App. 49a.

[3] The stipulations and findings established that:

a. The section chief's recommendation is the indispensable single most important factor in the promotion process . . . the employee is not permitted to apply for promotion or recommend himself or herself for promotion.

b. Section chiefs are given no written instructions pertaining to the qualifications necessary for promotion; they are given nothing in writing telling them what qualities to look for in making this recommendation.

c. The standards for promotion, which are, in practice, applied by section chiefs, are vague and subjective.

d. Vacancies . . . are not posted, announced or generally publicized.

e. There are no safeguards in the promotion procedure designed to avert discriminatory practices. App. 39a-40a, 71a-73a.

vealed even greater disparities.[4] The district court again held that these statistics resulted from the subjective and uncontrolled nature of the selection process for supervisors.[5]

The remedial decree entered by the district court (1) enjoined Western from engaging in any of the specific practices which the court found to be discriminatory; (2) ordered the company to "make whole" identifiable victims of past discriminatory practices by according them, where appropriate, back pay, front pay or priority consideration in filling future job openings; and (3) imposed temporary preferential quotas for hiring and promoting blacks and females in order to eradicate the lingering effects of Western's past discriminatory practices.

The court of appeals' decision held that petitioners, all present or former employees of Western, could not represent rejected applicants for employment, even though applicants had been certified as members of the class before trial, the class issues affecting rejected

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[4] a. Only 2.8% of the nonsupervisory employees promoted to installation supervisory jobs were black, even though blacks comprised as much as 23% of the work force from which such promotions were made during this period and no females were promoted to these supervisory jobs. App. 74a.

b. Only 8.9% of the nonsupervisory employees promoted to service center supervisory jobs were black and only 5.4% were female, even though blacks constituted as much as 26% and females 27% of the work force from which such promotions were made during this period. App. 75a.

[5] The process [for promotion to a supervisory job] is basically informal and non-structured. There are no written guidelines for evaluating potential supervisory personnel and the promotion decision is based upon the subjective evaluations of supervisors. The process is secret—vacancies are not posted and no one is allowed to "apply" for a job. App. 76a, 77a.

applicants had been fully tried, and the district court had awarded full relief to black and female applicants who had been discriminatorily denied employment. The court held that its ruling was required by this Court's decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977).

Although the court of appeals affirmed the district court's finding of discrimination in job assignments, it reversed the findings of discrimination in promotions both from hourly rated to salaried jobs and from nonsupervisory to supervisory jobs. In response to petitioners' proof that Western had no standards or criteria for promotions, and that the lack of standards and criteria resulted in disproportionately low rates of promotion for blacks and females, the court of appeals held that petitioners would have to prove what appropriate job-related standards and criteria would be "based upon experience or a combination of skill, experience and job performance or any other criteria which an employer might find relevant to decisions about promotions."

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Adoption of Per Se Rules Requiring That Rejected Employment Applicants Be Stripped of the Relief They Had Received in the Trial Court Against Hiring Discrimination Misconstrues the Decisions of This Court, Is in Conflict with the Decisions of Other Circuits, and Frustrates the Intent of Congress

The lower court's decision seriously restricts the availability of class treatment under Title VII of the Civil Rights Act of 1964, and does so in a manner which misconstrues and conflicts with the decisions of this Court, conflicts with the decisions of other circuits, and frustrates the clear intent of Congress. The

crux of the problem is the lower court's abdication of accepted principles of judicial discretion in favor of *per se* rules to be applied without regard to the facts of each case.

The facts of the case at bar illustrate the anomalies of the lower court's reflexive approach to Rule 23 determinations. Since November 21, 1975, the six petitioners had represented a certified class that included black and female applicants and employees at Western's facility in Arlington, Virginia. The petitioners were all present or former employees of that facility; one petitioner had been an unsuccessful applicant for one job more than two weeks before she was hired for a different job which was less desirable to her.[6] The class action was tried in early 1976, including the issues affecting rejected applicants, and petitioners prevailed in the district court on every one of the hiring issues raised in the complaint. App. 29a-37a. The district court awarded full relief on each of these issues. App. 88a-105a.

The evidence at trial complemented the record considered by the trial court in certifying the class to include applicants, and confirmed the strength of the nexus between the claims of employees and those of applicants: both sets of claims arose from the employer's practice of relying on standardless and uncontrolled subjective discretion in making personnel decisions, and the result of the employer's reliance on such standardless subjective discretion was that blacks and women were substantially disfavored in both hiring and promotion. App. 39a, 49a, 52a-55a, 71a-73a, 76a-77a. Moreover, employees frequently sought promotion to jobs which could also be filled by hire, and

[6] See the discussion at 14-15, *infra*.

thus competed with applicants. The trial court found that some of these jobs had traditionally been reserved for whites or for males (App. 31a-32a, 57a-58a, 61a-66a, 74a), and black or female employees obviously have the same interest as black or female applicants in challenging both the company's reliance on subjective discretion in filling the jobs and its reservation of jobs for whites or males.[7] In short, the evidence showed that there was a strong nexus between the claims of applicants and those of employees.

Neither in the trial court nor in the court of appeals was any contention raised that the named plaintiffs had failed to meet the Rule 23(a)(4) requirement that they "fairly and adequately protect the interests of the class."

A. The Decision Below Misconstrues and Contradicts This Court's Decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*

The court below held that applicants had to be excluded from the class, and the relief awarded to them vacated, on the ground that this Court's decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), forbade rejected applicants from ever being represented by employee-plaintiffs. App. 3a-4a. The court of appeals also held that *Rodriguez* prohibits Title VII plaintiffs from representing a class which includes applicants or employees at different

[7] One of the female petitioners had unsuccessfully sought transfers to various departments which filled their vacancies by either transfer or hire. The district court found that women were excluded from these departments by, *inter alia*, reliance on uncontrolled subjective discretion by white male supervisors. App. 52a-54a. The finding that women had been excluded was affirmed by the court of appeals. App. 6a-7a.

facilities of the same employer, unless the facilities are immediately contiguous. App. 4a-6a.[8] Otherwise, the class representatives would not meet the *Rodriguez* requirement that they "possess the same interests and suffer the same injury" as the class members they seek to represent. App. 3a-4a.

The thrust of *Rodriguez* was exactly the opposite—to require an inquiry into the Rule 23 questions of nexus and of adequacy of representation, not to forbid such an inquiry by the adoption of a mechanical *per se* rule. "[C]areful attention to the requirements of Fed. Rule Civ. Proc. 23 remains . . . indispensable." 431 U.S. at 405.

Nor are the facts of *Rodriguez* so similar to the facts of the case at bar as to require the *per se* rule adopted below. In *Rodriguez,* the plaintiffs had demonstrated their inadequacy as class representatives by failing to protect the interests of the class: they neither moved for class certification prior to trial, nor sought to have the class claims tried; they concentrated throughout the litigation on their individual claims to the detriment of the class claims, and a large part of the class had voted to oppose the relief sought by plaintiffs. Here, the plaintiffs timely requested and received class certification, tried the class claims in advance of their individual claims,[9] prevailed on the merits of the class

[8] This aspect of the court of appeals decision squarely conflicts with this Court's holding in *Califano* v. *Yamasaki,* 99 S. Ct. 2545 (1979), that even nationwide class treatment may be appropriate under Rule 23.

[9] The trial court reserved the personal claims of the petitioners and of class members for subsequent determination by a Special Master. App. 88a-89a.

claims, and obtained full relief for the class on those claims. No member of the class opposed any part of the relief requested.

In *Rodriguez,* the plaintiffs had stipulated that they had not been discriminated against with respect to their original hire; here, petitioner Marable has a claim of hiring and initial assignment discrimination. In *Rodriguez,* the claims of the named plaintiffs had been proven to be without merit prior to the certification of the class on appeal; here, class certification was entered prior to the trial and prior to any indication of any infirmity in the claim of any petitioner.[10] In *Rodriguez,* no effort was made to prove a nexus between the claims of the plaintiffs and those of the class, and the union vote tended to show a lack of nexus. Here, the strong nexus shown has been rendered irrelevant by the adoption of the *per se* rule.

The lower court's construction of *Rodriguez* is divorced from the facts of that case, and is based upon nothing more than its abstract interpretation of the phrase "possess the same interest and suffer the same injury" which it took out of context from the decision in that case. Petitioners respectfully submit that the decision of the lower court is a serious misinterpretation of *Rodriguez.*

B. The Decision Below as to the Effect of *East Texas Motor Freight System, Inc.* v. *Rodriguez* Is in Conflict with Decisions of Other Circuits

The Fifth Circuit held in 1974 that a former employee could represent a class which included unsuccessful applicants. *Long* v. *Sapp,* 502 F.2d 34, 43 (5th

[10] See the discussion *infra* at 14-16.

Cir. 1974). Reconsidering the issue after *Rodriguez,* the Fifth Circuit reaffirmed *Long en banc. Satterwhite* v. *City of Greenville,* 578 F.2d 987, 993-94 n.8 (5th Cir. 1978), *petition for cert. filed,* 74 U.S.L.W. 3513 (Dec. 21, 1978) (No. 78-1008). Contrary to the decision below, the Fifth Circuit recognized that this Court's decision in *Rodriguez* rested on the factual determination that the class representatives had failed to meet the Rule 23 requirements, and held that the controlling question under Rule 23 continues to be whether a plaintiff has a " 'sufficient homogeneity of interests' with the class to represent it." 578 F.2d at 992, quoting *Sosna* v. *Iowa,* 419 U.S. 393, 403 n.13 (1975).

Both before and after this Court's decision in *Rodriguez,* the Eighth Circuit has held that present or former employees may in an appropriate Title VII case represent the interests of applicants in challenging hiring discrimination. *Reed* v. *Arlington Hotel Co.,* 476 F.2d 721, 722-24 (8th Cir. 1973), *cert. denied,* 414 U.S. 854 (1973); *Donaldson* v. *Pillsbury Co.,* 554 F.2d 825, 827, 831-32 (8th Cir. 1977), *cert. denied,* 434 U.S. 856 (1978); *United States Fidelity & Guaranty Co.* v. *Lord,* 585 F.2d 860, 862, 865 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 1228 (1979) (holding that, although the class representatives were present or former employees, the certification of a nationwide class of applicants and employees was a lawful exercise of discretion and not to be overturned by mandamus).

The D.C. Circuit also has held that employees have standing in a Title VII case to represent rejected applicants and to challenge discrimination in hiring. *Gray* v. *Greyhound Lines, East,* 545 F.2d 169, 176 (D.C. Cir. 1976). Its decision was based upon the standing decision of this Court in *Trafficante* v. *Metropolitan*

Life Insurance Co., 409 U.S. 205 (1972), a decision reaffirmed last Term in *Gladstone, Realtors* v. *Village of Bellwood,* 99 S. Ct. 1601 (1979).

The decision below thus misconstrues the decision of this Court in *Rodriguez,* and is in conflict with the decisions of the Fifth, Eighth, and D.C. Circuits. The question of the proper interpretation to be given *Rodriguez* has substantially divided the district courts,[11] and, unless clarified by this Court, may result—as here—in an enormous waste both of judicial resources and of the limited resources available for private Title VII enforcement.

C. The Lower Court's Decision Frustrates the Intent of Congress That Class Action Treatment Be Freely Available in Title VII Lawsuits

The lower court's adoption of *per se* rules restricting the availability of class treatment in Title VII cases conflicts with the congressional intent, clearly expressed during the course of enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, that class treatment be freely available in cases brought under the statute:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of

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[11] *See, e.g., Brown* v. *J.P. Allen Co.,* 79 F.R.D. 32, 35 (N.D. Ga. 1978) (an employee may not represent applicants); *Carpenter* v. *Herschede Hall Clock Division,* 77 F.R.D. 700, 701 (N.D. Miss. 1977) (same); *Arnett* v. *American National Red Cross,* 78 F.R.D. 73 (D.D.C. 1978) (an employee may represent applicants); *Duncan* v. *State of Tennessee,* 19 E.P.D. ¶ 9087 (M.D. Tenn. 1979) (same); *Beasley* v. *Griffin,* 81 F.R.D. 114, 116 (D. Mass. 1979) (same).

> class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.

Section-by-Section Analysis, placed into the *Congressional Record* by the floor managers of the Act in each House, Subcommittee on Labor, Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 1773.

This Court should grant review of this question in order to ensure that its decisions be given proper scope and effect, to ensure uniformity among the circuits, to avoid an enormous waste of judicial resources, and to ensure the effectuation of a policy Congress has determined to be of the highest national priority.

II. The Lower Court's Decision That the Claims of a Certified Class Must Be Dismissed If a Named Plaintiff Does Not Prevail on the Merits of His or Her Individual Claim Is Contrary to the Decisions of This Court and Creates a Conflict Between the Circuits

As the court of appeals recognized, petitioner Marable asserted a claim of discrimination in hiring and had initially applied unsuccessfully for a clerical job at Western's facility. App. 3a note 1. She subsequently was hired by Western, but into a different job category which was less desirable to her. She continued, unsuccessfully, to try to obtain a clerical job with the company. The district court found that Marable was told there was not an opening in the office and that she could work her way up through the shop. He further found that a white female had been hired at the same time for an opening in the office. The district court also established a procedure for the adjudication of the personal claims of the plaintiffs and of the class members. The court of appeals ignored these findings of the district court and, instead, made its own determination that this petitioner had not proven her claim of hiring discrimination. App. 3a. The court of appeals then held that petitioner was not an adequate representative of the interests of applicants because of the failure of her personal claim of hiring discrimination.

Even assuming that petitioner Marable's claim had in fact failed for want of proof,[12] the lower court's view of the legal effect of such a finding on a previously certified class is in conflict with the decisions of this Court and with the decisions of other circuits. This Court has repeatedly addressed this issue and has held that a class becomes a distinct legal entity once it is certified, and that the subsequent mootness, or failure on the merits, of a named plaintiff's claim does not destroy the claims of the class members. *Sosna* v. *Iowa,* 419 U.S. at 400-02 (holding in addition that the requirement of adequacy of representation is met where—as here—"the interests of that class have been competently urged at each level of the proceeding," *id.* at 403); *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 752-57 (1976); *Rod-*

[12] Petitioners are also seeking review of the lower court's failure to apply the "clearly erroneous" standard. Petitioner Marable's personal claim of hiring discrimination will stand or fall with the resolution of this question.

riguez, 431 U.S. at 406 n.12. Comparable decisions in the courts of appeals are numerous. *See, e.g., Satterwhite,* 578 F.2d at 994-96, and cases there cited; *Donaldson,* 554 F.2d at 831-32 n.5, and cases there cited.

The lower court did not provide any explanation for its failure to follow the settled law established by this Court and followed by other circuit courts of appeals. Review or summary reversal by this Court is necessary to ensure that its decisions be given proper weight by the court below.

III. The Decision Below, Reversing the District Court's Findings of Discrimination in Promotion, in the Words of the Dissenting Judge, "Reflects a Fundamental Misconception Regarding the Proper Order and Nature of Proof" and It Conflicts with Principles Repeatedly Set Forth by This Court and Decisions of the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits

The court below, by a 2-1 vote, reversed the district court's well-supported findings of discrimination against blacks and females in promotions based on an erroneous theory as to the proper order of proof and burden of proof which plaintiffs must carry in order to make a prima facie showing of discrimination under Title VII. As Circuit Judge Lay stated in dissent, the majority's conclusion "reflects a fundamental misconception regarding the proper order and nature of proof in disparate impact actions under Title VII." App. 17a.

The evidence of promotional discrimination showed: that there were large disparities between the percentages of blacks and females receiving promotions and the percentages of blacks and females in the hourly work force from which it was stipulated that virtually

all promotees were selected; that there were no specific or written criteria or qualifications for promotion but, instead, that promotions depended exclusively on the subjective, standardless and entirely discretionary judgments of the employer's lower-level supervisors, practically all of whom were white males; and that the employer used an unvalidated written test in selection of promotees.[13]

Although such evidence clearly meets the requirements set forth by this Court and followed by virtually every court of appeals for establishing a prima facie case of discrimination, the lower court majority found it not only inadequate, but a "total failure of proof." App. 14a. The majority ruled that petitioners failed to establish a prima facie case of promotional discrimination because they did not offer proof that the employer denied promotions to "qualified" blacks or females:

> There was no attempt to identify an available pool [of black and female employees] based upon experience or a combination of skill, experience and job performance or any other criteria which an employer might find relevant to decisions about promotions. App. 11a.

The court of appeals thus ruled that it was plaintiffs' burden, in order to establish a prima facie case, to prove that class members were "qualified" for promotion to the positions in question, even though the employer failed to establish even that there were any "qualifications" for these positions, let alone that such "qualifications" were job-related. To have satisfied this burden, the plaintiffs would have had to prove that

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[13] See pp. 4-6, *supra.*

class members met certain "qualifications" (*i.e.*, "experience," "skill," "job performance") which the court of appeals, without any basis in the record whatsoever, assumed existed, assumed to be job-related, and assumed that Western used despite stipulations to the contrary.[14]

Circuit Judge Lay recognized that the majority had imposed an impossible burden on plaintiffs: "[t]he promotion practices utilized by Western Electric . . . *precluded* an initial definition of the pool of qualified employees." App. 18a (emphasis added). Continuing, Judge Lay wrote:

> Accordingly, the trial court used the racial and sexual composition of the entire hourly-employee work force as the most probative labor market percentages. At this juncture, the "experience" needs of Western Electric were properly addressed by the trial court to determine whether Western Electric successfully rebutted the prima facie showing of discrimination. In light of the fact that Western Electric had totally failed to apprise section chiefs of any promotion qualification requirements, the order in which the trial court evaluated the proof was clearly justified. App. 18a.

A. The Decision Below Conflicts with the Decisions of This Court

The majority below failed, without explanation, to abide by or even to recognize the decisions of this Court defining the nature of proof sufficient to establish a

[14] The lower court's use of "experience" as a qualification for promotion to the positions in question was particularly unsupportable in light of Western's express stipulations that no prior experience was required for promotion to these positions and that no minimum length of service was required. See discussion *infra* at pp. 25-26.

prima facie case in an employment discrimination action, namely *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). These decisions establish that when the evidence shows that an employer's selection standards or procedures have a disparate impact on blacks or females, the burden shifts to the employer to rebut that evidence by showing that its standards or procedures are nondiscriminatory and job-related. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. at 432. In *Dothard*, this Court stated:

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." Griggs v. Duke Power Co. . . .

433 U.S. at 329. *Accord, Albemarle Paper Co.*, 422 U.S. at 425; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 349.[15]

[15] The decision below also conflicts with this Court's holding in *Albemarle Paper* that an employment test that has a significant adverse impact on blacks may not be used to select employees for a particular job unless the employer demonstrates the test to be validated for such job. 422 U.S. at 432. The district court based its findings of discrimination in promotions in part on the employer's use, in selecting persons for promotion, of a written test which had a significant adverse impact on blacks but had not been validated for such use. The lower court decision reversing the district court's findings of discrimination fails even to mention the employer's use of this test, the fact that it was unvalidated, or the evidence of its discriminatory impact on blacks.

In imposing on plaintiffs the burden of identifying "qualified" blacks and females who were denied promotions, the court below has in effect applied erroneously the principles of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), to this class action pattern or practice case.[16] In *McDonnell Douglas,* this Court set forth the proof required of a plaintiff, in an individual case alleging "disparate treatment" on account of race, to make out a prima facie claim; the plaintiff's burden in such a case includes proving his qualifications for the employment in question. 411 U.S. at 802. The Court repeatedly has made it clear, however, that the burden of proof standard established in *McDonnell Douglas* does not apply to class action cases challenging a pattern or practice of discrimination and based on a "disparate impact" theory of discrimination:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . .

International Brotherhood of Teamsters v. *United States,* 431 U.S. at 336 n.15.

In *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), this Court reaffirmed the application of the *McDonnell Douglas* standards to an individual "disparate treatment" case, and expressly noted that "it was not a 'pattern or practice' case" like *Teamsters,*

[16] We note, however, that the court below, in reversing the district court's findings of discrimination in promotions, cited neither *McDonnell Douglas* nor any other decision of this Court pertaining to allocation of burden of proof in a Title VII case.

438 U.S. at 575 n.7, or a "disparate impact" case where the standards set forth in *Griggs* v. *Duke Power Co., supra*—rather than those set forth in *McDonnell Douglas*—would apply. 438 U.S. at 575.

The lower court's decision, by blurring the distinction which this Court has carefully maintained between the standards for individual "disparate treatment" actions and those for "pattern or practice" and "disparate impact" suits, inevitably will create confusion among the lower courts as to the proof required of plaintiffs in class action employment discrimination suits. The distinction is significant and will be in many cases, as in this case, outcome-determinative. Judge Lay's dissenting opinion below illustrates this. Citing *Griggs* v. *Duke Power,* Judge Lay points out that even where an employer utilizes clearly articulated and purportedly job-related criteria such as "experience" to evaluate candidates for promotion, a demonstrated "disparate impact" of those criteria requires the employer to bear the burden of proving that the criteria are justified by "business necessity." App. 18a n.1. *Accord, United Steelworkers of America* v. *Weber,* 99 S. Ct. 2721, 2730 (1979) (Blackmun, J., concurring); *Parson* v. *Kaiser Aluminum & Chemical Corp.,* 575 F.2d 1374, 1386 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 2417 (1979). As Judge Lay further noted, Western could not possibly have met this burden, particularly in light of its admission that it "does not contend that it established a 'business necessity' of a particular number of years of experience as a qualification for promotion." App. 18a-19a n.1, quoting Western's Reply Brief at 19.

B. The Decision Below Conflicts with Decisions of Other Circuits

The decision of the divided lower court is squarely in conflict with a variety of court of appeals decisions which apply this Court's "disparate impact" standards in "pattern or practice" cases. Several circuits have directly confronted the question whether plaintiffs or defendants bear the burden of proving what constitute appropriate "qualifications" for a job. In *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), for example, the court of appeals held that it was error for the trial court to have required plaintiffs, in order to establish a prima facie case of discrimination in promotion, to prove that members of the employee class "possessed the qualifications for a promotion":

> On the basis of this record, we find it difficult to discern just what qualifications the district court had in mind. Baxter's evidence demonstrated that promotions resulted only from supervisory recommendations based on esoteric standards never revealed to the discriminatees. It is hard to conceive how one can prove that he meets certain employment criteria when no standards have been delineated by the employer. It is obvious that the burden of proof, encompassing nebulous and indeterminate standards, was improperly imposed here.

495 F.2d at 444. *Accord, United States* v. *Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972); *Kaplan* v. *IATSE*, 525 F.2d 1354, 1358 n.1 (9th Cir. 1975); *Muller* v. *United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975); *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216, 218 (10th Cir. 1972).

The holding below also is in conflict with court of appeals decisions holding that a prima facie case of discrimination in selection for an employer's higher-level or supervisory positions may be established by showing a significant statistical disparity between the percentage of blacks or females in such positions and the percentage of blacks or females in the employer's hourly or overall work force. These cases include: *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1190-91 (5th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976) (semiskilled operatives and unskilled laborers used as basis of comparison on a claim of discrimination in promotions to the supervisory level); *Swint* v. *Pullman-Standard*, 539 F.2d 77, 103-05 (5th Cir. 1976) (on the same type of claim, total plant work force statistics were an adequate base but other statistics on black rejections of offers of promotions, and on more recent promotions, must also be considered); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1380, 1386 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 2417 (1979) (hourly production employees used as basis of comparison with number of supervisors); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 341 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (hourly workers used as a basis of comparison with number of craft workers); *Senter* v. *General Motors Corp.*, 532 F.2d 511, 527 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976) (total plant work force used as a basis for comparison with numbers of supervisors); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449-50 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977) (total plant work force used as basis for comparison on claims of discrimination in filling desirable hourly clerk positions and salaried positions).

Still a third group of court of appeals decisions in conflict with the Fourth Circuit's disposition of this case are those considering promotion and transfer practices which, like Western's, are wholly reliant on the exercise by white supervisors of standardless subjective discretion. Where such practices have a disparate impact on black employees, circuits other than the Fourth Circuit have held such evidence to constitute a prima facie case without any requirement that plaintiffs prove who would be "qualified" under undefined and nonexistent criteria which the employer could have used but has not. *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *Parson* v. *Kaiser Aluminum & Chemical Corp., supra,* 575 F.2d at 1385; *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 346 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *Stewart* v. *General Motors Corp., supra,* 542 F.2d at 450; *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 368 (8th Cir. 1973).

IV. The Decision Below, Reversing the District Court's Findings of Discrimination in Promotions, Conflicts with Decisions of This Court Holding That the Factual Findings of a District Court Must Not Be Disturbed Unless They Are Clearly Erroneous

The majority below erroneously substituted its judgment for that of the district court as to the composition of the appropriate labor pool from which candidates for promotion were drawn. The district court's findings that persons promoted to salaried positions and to supervisory positions were drawn from the employer's total hourly work force, and that this work force therefore constituted the appropriate labor pool, were supported by the overwhelming weight of the

evidence, including stipulations of fact agreed to by the employer.[17] The court of appeals did not determine that any of the district court's findings were clearly erroneous, but nevertheless rejected many findings, overrode the stipulations of fact, and concluded, contrary to the evidence, that the appropriate labor pool was defined by: (i) the census statistics for the Washington Standard Metropolitan Statistical Area ("SMSA") showing the percentages of black and female "Managers and Administrators" in the general population; or, alternatively, (ii) those blacks and females in the employer's hourly work force with a minimum of ten years of service with the employer.

Circuit Judge Lay spelled out in detail in his dissent why the majority erred in rejecting the district court's use of actual work force statistics in favor of generalized SMSA data. App. 15a-17a. Judge Lay also demonstrated the error in the majority's determination that the labor pool was limited to those employees with a minimum of ten years of experience:

> Western Electric stipulated that no specific number of years of experience is necessary to be qualified for promotion. Accordingly, the trial court used the racial and sexual composition of the entire hourly-employee work force as the most probative labor market percentages. App. 18a.

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[17] Specifically, it was stipulated that:

> There is no minimum length of service required either with the company or in a particular job level before an hourly-rated employee may be considered for promotion to the office. Jt. App. Below, p. 109.
>
> No prior experience is required to perform the job of service center section chief. Jt. App. Below, p. 115.
>
> No prior experience is required to perform the job of installation section chief. Jt. App. Below, p. 118.

By overriding the "no experience requirement" stipulations, the majority below was patently unfair to petitioners. As Judge Lay observed:

> Assuming, as the majority opinion apparently does, that ten years of experience was the prerequisite for promotion, plaintiffs could have attacked that qualification requirement as a facially neutral employment practice having a disparate impact on blacks and females. The statistics relied on by the trial court clearly support such a claim. Western Electric would then have been required to show that such a stringent experience requirement was justified by "business necessity." *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). In the instant case, however, plaintiffs can hardly be faulted for not directly attacking a job qualification requirement which Western Electric stipulated did not exist. Furthermore, in suggesting the ten year statistics as a basis for comparison, the majority suggests a defense which Western Electric candidly denies. App. 18a-19a n.1.

In elevating its own extra-record assumptions over the well-supported factual findings of the district court, the majority below completely ignored the strictures of Federal Rule of Civil Procedure 52(a) and the principles established by this Court in *Zenith Radio Corp.* v. *Hazeltine,* 395 U.S. 100, 123 (1969), that appellate courts must not disturb the factual findings of trial courts unless they are "clearly erroneous."

This principle is particularly applicable to determinations by district courts as to the appropriate labor pool for a specific employer's jobs. In *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977), the Court rejected the Eighth Circuit's definition of the appropriate labor market, which the court of appeals had substituted for the district court's definition. In

remanding the case to the trial court for a determination of the appropriate labor market, the Court said:

> "[S]tatistics . . . come in infinite variety. . . . [T]heir usefulness depends on all of the surrounding facts and circumstances." . . . Only the trial court is in a position to make the appropriate determination after further findings. 433 U.S. at 312.

In light of these principles, and the fact that the district court's findings were well supported by the evidence and not clearly erroneous, the majority below should have followed Judge Lay, who concluded:

> I would defer to the trial court's careful analysis. App. 25a.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-2439

OLLIE T. HILL, JOHN W. WARD, CHARLES R. MERRIWETHER, JR., EDWARD A. MINATEE, MINNIE MARBEL, MARY E. CARTER, Individually and on behalf of all other persons similarly situated,

Appellees,

versus

WESTERN ELECTRIC COMPANY, INC.,

Appellant.

THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION,

Amicus Curiae.

EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued April 6, 1978 Decided April 6, 1979

Before HAYNSWORTH, Chief Judge, LAY* and RUSSELL, Circuit Judges.

HAYNSWORTH, Chief Judge:

Six black male and female plaintiffs instituted this class action against Western Electric, alleging that the company had engaged in a pattern of discrimination against blacks and females in hiring, in job assignments, and in promotions to salaried and supervisory positions in its facilities in Arlington, Virginia. The district judge upheld all of the

plaintiffs' claims and granted extensive relief. Because no named plaintiff is a member of the excluded classes, we think the district court improperly considered the discrimination in hiring claims and the claim of discrimination against women in promotions in the Installation facility. We accept the findings of discrimination in job assignments in the Service facility as being not clearly erroneous, but we conclude that there was a failure to prove a *prima facia* [*sic*] case of discrimination in promotions.

Western Electric has a Service Center in Arlington, Virginia. Its principal work is the repair, refinishing and reassembly of telephone sets and other telephone equipment. There is an area in the shop, however, called "Shop Trades" in which wooden and metal telephone booths are repaired, refinished and assembled, and miscellaneous other woodwork and metalwork is done there. Some fourteen wood and metal workers, all of whom are white males, were assigned to that work.

The work in the Service facility is supported by a warehouse and by an administrative and technical office, both of which are housed in the same building in which the Service shops are operated.

A small portion of the building is occupied by the administrative office of the Installation division. Only office workers are there. The installers, who work under that administrative unit, are engaged in installing switching and receiving equipment in business and professional establishments in the metropolitan Washington area.

I.

The named plaintiffs are two black females employed in the Service Shop and four black males employed, or formerly employed, as installers of switching equipment in the Washington area. No one of the six was denied employment, and no one is a member of a class of black or female

applicants who were denied employment allegedly on the basis of race.[1]

At the time of his decision, the district court had for guidance our opinion in *Barnett v. W. T. Grant Company,* 518 F.2d 543 (4th Cir. 1975). There we allowed Barnett to represent a class which included some people who had not been disadvantaged directly in the same way Barnett alleged that he had been disadvantaged. In footnote 4, however, we noticed the problem which is created when representatives are allowed to represent a class which includes people who have not been disadvantaged directly just as the representatives have been. We permitted it in that case, however, because Barnett sought to represent only persons seeking positions as over-the-road drivers and had not launched a general attack upon racial discrimination in the employer's other employment practices.

If *Barnett* arguably might authorize these named plaintiffs, who were employed, to represent unsuccessful applicants, who were denied employment, the basis for any such application was foreclosed by the Supreme Court's subsequent decision in *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395 (1977). In *Rodriguez,* the Supreme Court emphasized that a class representative must "possess the same interests and suffer the same injury" as the class members they seek to represent. All blacks and females have an in-

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[1] One of the women plaintiffs, employed in the Service Shop, testified that she first sought employment as a clerk-typist in the office but was told there was no vacancy in the office, though another white girl who was seeking employment at the same time was given a job in the office. The records of Western Electric indicated that the only woman employed in the office within two months of the date of that plaintiff's employment was, indeed, a white woman with technical skills, and she was employed as a technician, not as a clerk-typist. Under the circumstances, the fact that this plaintiff was offered a job in the shop rather than as a clerk-typist, does not suggest that she had been denied employment because of her race.

terest in being free from discrimination in employment. In a very broad and loose sense, any member of any such class who suffers discrimination has the same interest as other members of the class who suffered discrimination in very different circumstances and by very different means, but clearly that is not the thrust of *Rodriguez*. The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring. Under *Rodriguez*, certification of a class including victims of alleged hiring discrimination who never were employed by Western Electric was in error.

II.

If *Rodriguez* limited *Barnett* in application, it did not leave it a derelict. Under *Barnett* a named plaintiff may represent a class of persons whose injuries and interests are of a kind with the representative's. A person who has been injured by unlawful, discriminatory promotion practices in one department of a single facility may represent others who have been injured by the same discriminatory promotion practices in other departments of the same facility. In such a case, the representatives of the class all have the same interests in being free from job discrimination, and they have suffered injury in precisely the same way in the denial of promotion. *Rodriguez* did not require the fractionization of similar claims by a class of employees in a single facility, nor does it destroy the utility of the class action device by requiring separate suits on an episodic basis.

What is left of *Barnett*, however, is not broad enough to permit a named representative to represent a class of people who suffered different injury or those having similar claims but who are employed in other facilities. The In-

stallation facility is not a single facility with the Service Shop. It is a separate one.[2]

It is true that the small office component of the Installment facility is located in the same building housing the Service Center, but the affected people, the installers, are not employed there. They do their work entirely in the field. Their job sites change. They range all over the area, and their work is done on premises belonging to others than Western Electric. There is no apparent basis for a finding that they have a community of interests with the employees in the Service Center.

In *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), we treated two plants of the same employer as a single facility for the purpose of class action representation. There, the two plants were within a few blocks of each other. Each plant had a prefabrication department in which tobacco was mixed and blended, and it was principally the employees of those departments who complained of discrimination in promotion. We emphasized the fact that the two plants drew their employees from the same labor market, and, of course, they were drawn to do similar work.

In this case, however, though we may assume that the installers live in the same geographic area as the employees of the Service Center, that is, the entire metropolitan Washington area, they are not drawn from the same labor market as they were in *Patterson*. The work of the hourly paid employees of the Service Center is relatively unskilled, while the installers are engaged in installing, servicing and fixing sophisticated electronic equipment requiring many and varied skills. Newly employed installers are

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[2] There have been no women installers, so there are no installers who may assert a claim of discrimination in job assignment or promotion in the Installment facility. Since the district court granted affirmative relief against sex discrimination in promotions in the Installment facility, however, it is not inappropriate to consider its separateness.

not required to have previous training or experience. After employment, they are given formal training and provided with experience. As new skills are acquired, they progress in five steps, each step being called an index, until the most skillful and experienced reach step 5. People with the gifts and ambition to become such technicians simply do not compete in the same labor market with unskilled workers.[3]

III.

The plaintiffs first allege discrimination in the assignment of employees to jobs in Shop Trades, to jobs in the warehouse and to jobs in the office.

A. Shop Trades

The employees holding jobs in Shop Trades have all been white males. Its foreman testified that on two different occasions when there were vacancies to be filled in Shop Trades, through other foremen in the Service Center, he invited a list of employees who might be interested in a transfer to Shop Trades. On each occasion he received a list with a substantial number of names upon it, and some of the listed people were black and some were female. All of them were interviewed and were allowed to see the jobs in which there were vacancies, but afterwards no one of those persons, black or white, male or female, was interested in actually being transferred. This is not inconceivable since woodworking and metalworking may require greater skills than most of the other jobs in the shop por-

[3] The named plaintiff who testified about her wish to become a clerk-typist and to be transferred to Shop Trades and to the warehouse, testified that she was trained to do her first job in the service shop in approximately two hours. Later she was trained to do other jobs in the shop, and each time the training consisted of her being shown by an hourly rated employee how to do it. In contrast, the installers receive formal training as they progress to the fifth step in the rating of skills.

tion of the Service Center. Nevertheless, there is the fact that no black and no female had ever been assigned to one of these woodworking and metalworking jobs, and there is the testimony of the plaintiff, Marbel, that she sought a transfer to Shop Trades because people there progressed more rapidly to pay grade 3, but did not obtain it. Thus there is evidentiary support for the district judge's finding that there was both racial and sexual discrimination in job assignments to Shop Trades.

B. Warehouse

The district court also found that the defendant had been guilty of illegal sex discrimination in making job assignments to warehouse positions in the Service Center. A position in the warehouse also had the advantage of a position in Shop Trades of a more rapid progression to pay grade 3 than for other employees in the shop of the Service Center.

It is clear that for many years Western Electric regarded the jobs in the warehouse as appropriate for men only. No woman was assigned to a job there until 1972, when only one was. From July 1965 through 1974, four hundred fifty-one persons have been hired for warehouse jobs, all but the one woman being men. Moreover, there was the testimony of the plaintiff, Marbel, that between 1966 and 1970 she sought a transfer to the warehouse, but did not obtain it.

The policy of exclusivity with respect to females in the warehouse was abandoned by 1972 when the one woman was employed. It may be, too, that the jobs in the warehouse may be heavy jobs, unsuitable for most women, but the fact that only one woman had been employed there between 1972 and the time of trial supports the finding of the district court that there was continuing sex discrimination in assignment of employees to the warehouse, if not a continuing policy of exclusivity.

C. The Office

The district court also found racial discrimination in the assignment of blacks to the Service Center office. This was premised principally upon data showing that blacks had never constituted more than ten percent of the work force in the office, and that from 1965 to 1974 only 7.9 percent of the persons newly hired for office work were black. The trouble with those statistics, however, is that there is no differentiation between those jobs in the office for which employees in the shop might be qualified and those for which they are not. There are some positions in the office requiring little skill, but we are not told how many, or what proportion, of the people filling them are black. Nor is the void filled by the testimony of Ms. Marbel, who testified that when she initially applied she was told that there were no openings in the office for a clerk-typist, but that a white woman was employed for a position in the office, a position which the employer's records disclosed was that of a trained technician. The question now is one of job assignments of unskilled employees,[4] and there was simply no showing, *prima facie* or otherwise, of any disparity in the assignment of blacks to those kinds of positions in the office.

D. Remedy

Since we have held that there is a basis for the findings in the district court of racial and sex discrimination in the assignment of employees to Shop Trades and of sex discrimination in the assignment of employees to the warehouse, we generally approve the decree's provision for back and front pay for those individuals who can show they suffered deprivation by reason of such discrimination. We emphasize, however, that the burden must be upon the individual claimant to prove that he or she sought a position, or would have sought it had not an application been

[4] As indicated above, the question of possible discrimination in hiring is not now before us.

excused under the principle of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, that the applicant was qualified to fill the position, having such skills and physical strength as were necessary for performance of the work, would have accepted the position had it been offered, and that there was an available position which was filled by someone else in conformity with the discriminatory policy.

IV.

Promotions

The district court found discrimination in promotions.

In the Service Center, the usual progression from hourly rated jobs to supervision was by way of intermediate salaried, non-supervisory positions in the office. Section Chiefs, the lowest level supervisors, were drawn almost exclusively from salaried office workers who had been promoted from hourly rated jobs in the shops or warehouse. The district judge found discrimination at both promotional levels and that the victims included both black and females.

The district court also found discrimination against blacks and females in promotions at Installation. There, the Section Chiefs were selected by supervisors from among the installers who had achieved at least Index 4.

The court ordered extensive relief. A Special Master was appointed to hold hearings, to identify victims of discriminatory promotional practices and to award them back and front pay. Western Electric was required to make priority promotional offers to such identified discriminatees, after which a system of quotas was imposed upon the employer in making promotions. Subject to a stated availability of qualified persons, promotions to salaried non-supervisory office positions in the Service Center were to be at the ratio of at least two blacks for every one other employee so promoted, and of at least three females to every two males.

For the positions of Section Chiefs in the Service Center and in Installation, the ratio was two blacks for every other employee. In the Service Center, Western Electric was required to promote three females to supervisory positions for every two males, while in Installation the ratio was to be one female for every two males, though at the time of the decree there was no female installer.

In every instance, the quotas were to remain in effect until the percentage of blacks and females in the promotional positions "approximates cumulative applicant pool proportions from the previous four (4) years."

Thus the quotas placed upon the promotion of hourly rated employees to upper level and supervisory positions were not referrable to the pool of experienced employees, or even to the pool of all employees, regardless of experience. They were referrable to the applicant pool.

While the quotas which were ordered were referrable to the applicant pool, the initial finding of discrimination in promotion was premised upon a finding of disparity in the number of blacks and females promoted in comparison with the number of blacks and females in the hourly paid work force. Such a comparison, of course, treats the recently employed person in an entry level job as qualified for promotion to a salaried job in the office at the Service Center or to a supervisory position. In the Service Center, for instance, only 10% of those in hourly paid jobs in 1965 were black. The number of whites employed in such positions declined from 555 at the end of 1965 to 492 at the end of 1973, while the number of blacks in such positions increased from 62 in 1965 to 227 at the end of 1973. At the end of 1973 blacks constituted 31.6% of the employees in hourly paid jobs, and an average for the nine year period produced a figure of 26.4% black work force. The court found that 26.4% of those available for promotion were black and disparity between that figure and the fact that of those promoted to salaried jobs, only 9.8% were black. Similarly, the number of females employed in hourly rated

jobs in the Service Center increased from 85 in 1965 to 161 at the end of 1973, an increase from 13.8% of the work force to 22.4% of the work force. The average for the nine years was found to have been 18.8%, and it was found that females constituted 18.8% of those available for promotion, while only 11.9% of those actually promoted were female.

Thus, the findings of disparity and discrimination in promotions of both blacks and females were premised upon an assumption that all employees in hourly rated positions constituted the available pool from which persons promoted to salaried positions were to be drawn. This necessarily included those in entry level jobs, those with little experience and little skill. There was no attempt to identify an available pool based upon experience or a combination of skill, experience and job performance or any other criteria which an employer might find relevant to decisions about promotions.

The assumption that minimally qualified hourly rated employees were qualified for promotion to a salaried position is simply unfounded. The district court was probably misled by a stipulation that prior experience was not a requisite for supervisory positions. The stipulation in turn was probably the consequence of the fact that at Installation three college graduates, without prior experience as installers, had been made Section Chiefs in Installation pursuant to a college graduate development program. Though they had no prior experience as installers, this in no way suggests that an untrained, unskilled person, seeking employment in the jobs requiring the least skill, is immediately qualified for a high level salaried job or for supervision. Common experience belies the assumption. We do not employ babes at high salaries to lead men doing hourly rated work. In higher educational institutions, people with unusual capabilities may be trained for the performance of supervisory roles. When, however, the pool

from which supervisors are to be selected is the hourly paid work force, one naturally and inevitably looks to those who have acquired experience and demonstrated skills. The greater the experience and the greater the number of demonstrated skills, the more appropriate it is for consideration to focus upon a particular individual. One does not look for supervisors at the bottom rung of the ladder; it is at the top where any search may be expected to produce fruitful results.

In *Roman v. ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976), we held that an employer was entitled to adopt selection standards based upon demonstrated ability, proper qualifications, experience and length of service and to consider such things as job performance, willingness to accept responsibility and dependability. In *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), we held that the ratio of blacks and females in supervisory positions should be judged on the basis of their ratio in the qualified work force, and that a standard might be found in SMSA data. In the Washington SMSA this would yield a ratio of 4% blacks and 10% females in Western Electric's Section Chief positions.

That experience was an essential requirement for promotion from hourly rated jobs is indicated by the fact that from July 1965, when Title VII became effective, those persons promoted to Section Chief in the Service Center had an average of 15.3 years experience, while those in Installation had an average of 14.8 years experience. Some at each facility had been promoted with less than the average experience, but the least in the Service Center was more than six years, while the least in Installation was more than eight years. Of all those promoted to Section Chief jobs, 79% in the Service Center and 77% in Installation had ten or more years experience. There was testimony that experience was an important factor in the process of selecting people for promotions, as were job

knowledge, skills, a sense of responsibility and attendance dependability.

If the ratio of blacks and females in all hourly rated jobs is disregarded, as it must be in considering promotions, what remains in the record is insufficient to show any disparate impact upon blacks and females. From mid-1965 through 1973, of those promoted to salaried positions in the Service Center, 9.8% were black and 11.9% were women. The Washington SMSA data suggests only 4% black and only 10% female. In 1965 blacks represented only 10% of the hourly paid work force, and that proportion grew to 31.6% at the end of 1973. Only 9.8% of those promoted to salaried positions in the Service Center through 1973 were blacks, but only 7% of the blacks in the hourly paid work force at that time had as much as ten years experience. Of those promoted to salaried positions in the Service Center, 11.9% were female. There is in the record a table showing that 15% of the females employed in non-supervisory, non-professional positions in the Service Center had as much as ten years experience, but that table includes women employed in the office and the people in non-supervisory salaried positions. There is no data reflecting the work experience of the hourly paid female employees in the Shop.

Of those promoted to Section Chief in the Service Center since July 2, 1965, 8% were black and 5.4% were female. The number of blacks substantially exceeded the SMSA comparison, while the number of females was substantially deficient. The comparison is quite imperfect, however, for the salaried employees constituted the pool from which promotions to Section Chief were made, and there is nothing in the record permitting a comparison of the number of males and females promoted to Section Chief out of that portion of the pool which became salaried on or after July 2, 1965. The number of persons already in the pool on that date necessarily greatly distorts any comparison.

In Installation, only one black had been promoted to Section Chief, and, in a period of general curtailment and reduction in force, he was demoted to an Index 5 installer.[5] While there are figures showing the racial composition of the installers, there are no such figures for Index 5 or for Index 4, from which the Section Chiefs were drawn. There are data indicating that only four blacks achieved Index 5 during the period July 1965 through 1971, but that figure is of no assistance without complete data about all promotions to Installation Section Chief and the racial composition of the pool from which the Section Chiefs were drawn.

Thus there was a total failure of proof of any disparate effect in promotions upon blacks or women in the Service Center or upon blacks in Installation.

V.

Our conclusion is that on this record a finding of discrimination against blacks and females is warranted only in job assignments to Shop Trades and against females in job assignments in the warehouse in the Service Center. Upon remand, the district court should frame an appropriate decree consistent with this opinion, granting appropriate relief with respect to those job assignments. In all other respects, the findings of discrimination are vacated.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

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[5] There was a finding that this demotion was not discriminatory. Other installer Section Chiefs were also demoted.

LAY, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's affirmance of the trial court's finding of discrimination in job assignments. Likewise, I concur that plaintiffs lack standing to challenge Western Electric's hiring practices and the alleged sex discrimination in promotions in the Installation facility.

I must voice vigorous disagreement, however, with the reversal of the district court's findings of discrimination relating to the other promotion practices of Western Electric. I agree with the trial court's finding that plaintiffs not only established a prima facie case of discrimination but also presented strong evidence which amply demonstrates that the facially neutral promotion practices have a disparate impact on blacks and female employees entitling them to the remedial relief.

The trial court's opinion adopts as statistical support for its disparate impact finding the data set forth in plaintiffs' Proposed Findings of Fact (¶¶ 104-110). These statistics establish:

1. While blacks constituted 26.4% of those available for promotion from hourly-rated to salaried nonsupervisory jobs, only 9.8% of those promoted were black;

2. While females constituted 18.8% of those available for promotion from hourly-rated to salaried nonsupervisory jobs, only 11.9% of those promoted were female;

3. Only 2.8% of the nonsupervisory employees promoted to installation supervisory jobs were black, even though blacks comprised as much as 23% of the work force from which such promotions were made during this period, and no females were promoted to these supervisory jobs;

> 4. Only 8.9% of the nonsupervisory employees promoted to service center supervisory jobs were black, and 5.4% were female, even though blacks constituted as much as 26% and females 27% of the work force from which such promotions were made during this period.

Thus, the district court relied on the disparities between the percentages of blacks and females in the pool of employees eligible for promotion to salaried and supervisory positions and the percentages of blacks and females actually promoted to such positions.

The majority opinion advances two sets of statistical data which allegedly provide a more accurate basis for assessing the impact of Western Electric's promotion practices. First, the majority suggests the Washington SMSA statistics *might* contain a more appropriate standard of comparison. SMSA figures would yield a ratio of 4% blacks and 10% females in Western Electric's salaried and section chief positions. When these percentages are compared to the proportions of blacks and females actually promoted, the conclusion is drawn that no disparate impact exists. In addition, the majority opinion utilizes statistical data which suggests that an employee should have at least ten years experience to be qualified for promotion to salaried positions in the Service Center. Since only 7% of the blacks and 15% of the females in the hourly work force in 1973 had the requisite experience, it is argued that the statistical data offered by plaintiffs fails to establish even a prima facie showing of disparate impact. From the foregoing it is concluded that the trial court erred and that there was a "total failure of proof of any disparate effect in promotions upon blacks or women in the Service Center or upon blacks in Installation." *Ante* at 22.

The trial court considered the efficacy of using SMSA statistics and experience-related data to determine whether

a prima facie showing of discrimination was made. In properly rejecting the SMSA data, Judge Bryan observed:

> The facility in question is located in Arlington County, Virginia, a largely residential suburb of the District of Columbia. The Washington SMSA includes not only Arlington County, but the District of Columbia, the Cities of Alexandria and Falls Church, the Counties of Fairfax, Loudoun and Prince William in Virginia, and the Counties of Montgomery and Prince Georges in Maryland. This is too large an area to be considered as the area from which an employer, situated as the defendant is here, draws for its labor market. Here the entry level jobs at both units are, except for secretarial employees, for the unskilled, and the census data does not provide an accurate or reliable indication of persons who are available for work in a particular job with a particular employer. Insofar as vocational and occupational data are concerned, the census data does not, of course, take into account existing discrimination.

Hill v. Western Electric Co., 12 FEP Cases 1175, 1179 (E.D. Va. 1976).

It is difficult for me to understand how the over-inclusive census statistics contained in the Washington SMSA can be considered more probative to the issue at hand than the actual work force from which the promotions are made at the specific plant in question.

The majority opinion does not rest on the SMSA statistics alone, but rather relies primarily on the experience-related data to support its conclusion that no disparate impact was proven. The majority's use of the lengthy-experience "requirement" reflects a fundamental misconception regarding the proper order and nature of proof in disparate impact actions under Title VII.

As previously noted, the trial court *did* consider the "experience" claims of Western Electric when determining whether discrimination existed. The promotion practices utilized by Western Electric, however, precluded an initial precise definition of the pool of qualified employees. Under Western Electric's promotion procedures, employees had to be placed on a list by their section chief in order to be eligible for promotion. Western Electric provided the section chiefs no written guidelines setting forth the qualifications necessary, or the criteria used, for promotion of employees. The factors employed by the section chiefs in determining whether to place an employee on the list were vague and subjective. Furthermore, Western Electric stipulated that no specific number of years of experience is necessary to be qualified for promotion. Accordingly, the trial court used the racial and sexual composition of the entire hourly-employee work force as the *most probative* labor market percentages. At this juncture, the "experience" needs of Western Electric were properly addressed by the trial court to determine whether Western Electric successfully *rebutted* the prima facie showing of discrimination. In light of the fact that Western Electric had totally failed to apprise section chiefs of any promotion qualification requirements, the order in which the trial court evaluated the proof was clearly justified.[1]

[1] Assuming, as the majority opinion apparently does, that ten years of experience was the prerequisite for promotion, plaintiffs could have attacked that qualification requirement as a facially neutral employment practice having a disparate impact on blacks and females. The statistics relied on by the trial court clearly support such a claim. Western Electric would then have been required to show that such a stringent experience requirement was justified by "business necessity." *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). In the instant case, however, plaintiffs can hardly be faulted for not directly attacking a job qualification requirement which Western Electric stipulated did not exist. Furthermore, in suggesting the ten year statistics as a basis for comparison, the

The trial court's inquiry did not begin and end with the statistical data. Judge Bryan properly allowed Western

majority suggests a defense which Western Electric candidly denies. Western states in its brief:

> Western does not contend that it established the "business necessity" of *a particular number of years* of experience as a qualification for promotion, but that *experience* is relevant to the threshold inquiry of whether Western's promotion practices have had an adverse impact.

Reply Brief of appellant at 19 (emphasis added).

I would make one additional comment on the majority's treatment of the experience factor. By using ten years experience as the factor which defines the qualified work force, the majority, in effect, elevates lengthy experience to a promotion qualification. The majority opinion justifies this conclusion by noting that "one naturally and inevitably looks to those who have acquired experience and demonstrated skills" when selecting supervisors. *Ante* at 18. The fact that an employer would probably look to its experienced employees when determining who should be promoted may negate an inference of discriminatory intent, but it does not resolve an adverse impact claim. By definition, an adverse impact cause of action arises when job qualifications which are facially neutral and neutral in terms of intent fall more harshly on minorities. *See, e.g., Griggs v. Duke Power Co., supra; Stewart v. General Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 268 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *United States v. Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir. 1970). When examining such job qualifications

> the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972).

Electric to present evidence which would cast doubt on the propriety of using the entire hourly-wage work force in determining whether promotion practices had a disparate impact on blacks and females. Western Electric strenuously argued before the trial court that experience is relevant in making promotion decisions. In assessing the credibility of the "experience defense" proffered by Western Electric, the trial judge noted that a lengthy-experience requirement could be used to perpetuate discrimination in hiring. Although plaintiffs have no standing to launch a frontal assault on Western Electric's hiring practices, the trial court could legitimately consider evidence of such discrimination when evaluating the experience claim.[2] *See Rowe v. General Motors Corp.*, 457 F.2d 348, 356 (5th Cir. 1972); *cf. Hazelwood School District v. United States*, 433 U.S. at 309 n.15. Furthermore, contrary to the majority's conclusion, the relevance of experience in determining whether an employee is qualified for promotion is not overlooked in the trial court's remedial or-

[2] To support its finding of discrimination in hiring the trial court relied on the following:

> (a) Only 12.7% of the black applicants for entry-level jobs in defendant's Service Center from 1970 through 1974 were hired as compared to 29.8% of the white applicants; while 1,489 of the 3,382 applicants (or 44.4%) were black, only 189 of the 754 applicants hired (or 25.1%) were black.
>
> (b) Only 17.9% of the black applicants for entry-level jobs in defendant's installation organization from 1968 through 1971 were hired as compared to 45.7% of the white applicants; while 1,293 of the 2,760 applicants (or 46.8%) were black, only 232 of the 903 applicants hired (or 24.7%) were black.
>
> (c) Only 16.9% of the female applicants for entry-level jobs in defendant's Service Center from 1970 through 1974 were hired, as compared to 26.8% of the male applicants; while 1,443 of the 3,511 applicants (or 41.1%) were female, only 244 of the 799 applicants hired (or 30.5%) were female.

12 FEP Cases at 1179.

der, nor is it necessarily obviated in the master's duty to award back pay related to promotional transfers.[3]

In addition, in rejecting the experience factor as a threshold issue, the district court viewed not only the statistical proof but also the overall record regarding the subjective employment practices in which promotions were made. I think it significant to highlight this other evidence, not otherwise discussed in the majority opinion. Judge Bryan, in an exhaustive and analytical opinion, wrote:

> *Promotion—Service Center.*
>
> Promotion within hourly positions is done strictly by departmental seniority unless an individual is de-

[3] With regard to priority promotions, the trial court's remedial order states:

> Promotion shall be offered only to those eligible claimants who are employed at the time by the defendant, and who are qualified on a job-related, non-discriminatory basis.
>
> . . . .
>
> If a claimant is found to be eligible by the Master, but subsequently is found to be unable to perform the duties of a position at the time the defendant otherwise would be required to make a priority offer of that position to that claimant, no obligation to make such an offer shall be imposed on defendant.

With regard to back pay, the order states:

> [T]he Master may take into account the eligible claimant's actual employment history and such other factors as he may deem relevant to that claimant's performance potential, and may adjust the formula figure up or down accordingly, stating the reasons for such adjustment.
>
> . . . .
>
> Defendant shall have the opportunity to seek reduction of the net back pay award for each eligible claimant by showing higher actual earnings, or earnings obtainable through due diligence, or demonstrable factors probative on the question of how the claimant might have performed had no discrimination occurred.

termined to be unqualified. As yet, no one has ever been found to be unqualified.

The potential problem with this scheme of promotion is that it perpetuates past discrimination and reflects discrimination in original hiring. The fact that promotions are always made from within the particular section in which the vacancy occurs adds to this, since transfer among sections is prohibited. However, the Court does not find any discrimination in the *system* of promotion.

Hourly to Salaried Non-Supervisory

Promotion of hourly workers to salaried non-supervisory positions is made from a list of recommended employees. The initial recommendation to place an employee upon the list is made by the section chief. This recommendation is reviewed by two higher supervisory levels. The specific promotion recommendation is made by an advancement committee but sometimes by the section chief. The final decision to promote is made by the assistant manager and manager.

The statistics support, and the Court finds an adverse impact on blacks and females and discrimination in this class of promotion (Plaintiff's Proposed Findings of Fact ¶¶ 104-110). The promotional procedure itself is supportive of the Court's finding, because an employee cannot be promoted unless he is placed upon the list and the only way that can be done is by the section chief. Section chiefs are given no written guidelines for this task and the factors employed by the section chiefs are necessarily vague and subjective. Additionally, vacancies are not posted and there is no way for an individual to apply for a particular position. The section chief's decision is final and unreviewable.

. . . .

Non-Supervisory to Supervisory

Supervisory promotions are made from a Management Potential Inventory. In order to be listed, an employee must first complete a request form. Annually, all supervisors meet and there determine who shall be placed upon the list. The actual promotion decision is made and reviewed up four levels of supervisory command.

The statistics from 1965 support a charge of discrimination (Exhibit P-243). In addition, the promotion procedure is subject to most of the same objections as "hourly to Salaried Non-Supervisory." The process is basically informal and non-structured. There are no written guidelines for evaluating potential supervisory personnel and the promotion decision is based upon the subjective evaluations of supervisors. The process is secret—vacancies are not posted and no one is allowed to "apply" for a job, only the list.

The defendant seeks to offset the plaintiff's statistics with statistics of its own. No one has been promoted since 1972. In 1972, five people—including 1 black and 2 females—were promoted. Defendant claims that the overall disparate statistics are due to the fact that generally, only those employees with ten or more years of experienced [sic] are promoted. Only one person hired since 1965—a woman—has been promoted to supervisor. Nevertheless, the statistics are such that they cannot be explained away in this manner. They result, the Court finds, from past discrimination, and warrant, at the very least, injunctive relief.

Promotion—Installation.

. . . .

Supervisory Positions

Annually, the department chiefs and the district manager select names of non-supervisory employees and place them on a Management Potential Inventory. When a supervisory vacancy occurs, an employee is selected from this list to fill it.

The statistical evidence supports a finding of discrimination. There has only been one black and no female supervisors. The defendant once again asserts that length of employment is the basic criterion for promotion. In addition, there have been only five promotions since 1970 and none since 1973. In fact, since 1972 there has been a net downgrading from supervisory to hourly of 28 positions.

The objections to the actual promotion procedure are similar to those for the Service Center. An employee must be recommended to be placed upon the Management Potential Inventory; and this decision is unstructured and subjective. Again, as in the case of the Service Center, injunctive relief is warranted.

12 FEP Cases at 1181-83.

In view of this additional evidence and the exhaustive and specific findings of fact by the trial court, I find it difficult to say there is a total failure of proof by plaintiffs to show discrimination in promotional practices. Even if it is assumed that the statistical comparison employed by the district court fails to furnish a precise measure of Western Electric's conduct, the additional findings made by the trial court warrant injunctive relief. As this court stated in *Patterson v. American Tobacco Co.:*

> The fact that the company's appointments since 1965 exceed the ratio of qualified blacks and women in the workforce does not exonerate the company for the violations of the Act which the district court found. The tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered.

535 F.2d at 275.

Any number of cases, including decisions of this circuit, have emphasized that subjective practices utilized by defendant constitute strong evidence of discrimination. *See, e.g., Parson v. Kaiser Aluminum & Chemical Corp.,* 575 F.2d 1374, 1384-85 (5th Cir. 1978); *Roman v. ESB, Inc.,* 550 F.2d 1343, 1351 (4th Cir. 1976); *Stewart v. General Motors Corp.,* 542 F.2d 445, 450-51 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977); *Patterson v. American Tobacco Co.,* 535 F.2d at 272-73; *Muller v. United States Steel Corp.,* 509 F.2d 923, 928 (10th Cir.), *cert. denied,* 423 U.S. 825 (1975); *United States v. N.L. Industries, Inc.,* 479 F.2d 354, 368 (8th Cir. 1973); *Rowe v. General Motors Corp.,* 457 F.2d at 358-59.

For the foregoing reasons, I would defer to the trial court's careful analysis.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-2439

[Filed May 29, 1979.]

OLLIE T. HILL, JOHN W. WARD, CHARLES R. MERRIWETHER, JR., EDWARD A. MINATEE, MINNIE MARABLE, MARY E. CARTER, individually and on behalf of all other persons similarly situated,

Appellees,

vs.

WESTERN ELECTRIC COMPANY, INC.,

Appellant.

ORDER

Upon consideration of the petition for rehearing, there having been no request for a poll of the court on the suggestion of rehearing *en banc,*

IT IS ORDERED that the petition be, and it hereby is, denied.

With the concurrence of Judge Lay and Judge Russell.

For the Court:

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

May 24, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION No. 75-375-A

OLLIE T. HILL, *et al.*,

Plaintiffs,

v.

WESTERN ELECTRIC COMPANY, INC.,

Defendant.

MEMORANDUM OPINION

This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The named plaintiffs are black and female employees of defendant Western Electric Company, Inc., at its Arlington, Virginia facility. The plaintiffs complain, on behalf of themselves and the class they represent, that the defendant has discriminated and continues to discriminate against blacks and females in hiring, job placement, promotions, selection of supervisory personnel, layoffs and treatment of pregnant employees.

The action was filed on May 14, 1975. On November 21, 1975, the Court entered an order determining that the action should be maintained as a class action and specified that the class should consist of:

> All black persons and all female persons who are, have been, or will be employed by Defendant at Defendant's facility in Arlington, Virginia, at any time since July 2, 1965; and all black persons and all female persons who have applied for employment at Defendant's facility in Arlington, Virginia, since July 2, 1965, or who will hereafter apply.

The case was tried to the Court on February 17, 18 and 19, 1976. Counsel waived closing argument and in lieu thereof it was agreed that post-trial briefs would be filed after preparation of the transcript of the trial. The last of these briefs was received on April 8, 1976. In addition, counsel for both sides have submitted extensive proposed findings of fact from which the Court will borrow heavily in support of its conclusions.

The case was tried on the issue of liability only, with the decision on the relief, if any, to be awarded plaintiffs to be deferred until after a decision on liability. In addition, the notice requirements of F. R. Civ. P. 23(b)(3) were postponed until after determination was made with regard to entitlement to monetary relief.

Before reaching the merits of the discrimination charges, there are two preliminary matters raised by the defendant requiring resolution. First, the defendant contends that the hiring issue and the allegations of sex discrimination in its Installation Area (Installation) [1] are not properly before the Court since none of the named plaintiffs were unsuccessful employment applicants at Installation, nor were any of the named female plaintiffs employed there. Second, the defendant asserts that the time frame within which the impact of its employment practices should be viewed in determining liability should commence 180 days before the filing with the Equal Employment Opportunity Commission (EEOC) of the charges which provide the basis for this action insofar as Title VII is concerned and two years prior to May 14, 1975, the date on which the complaint was filed, insofar as § 1981 is concerned.

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[1] As will be pointed out in the findings of fact, the defendant's Arlington facility houses both its Service Center and Installation Area. The latter rents approximately 1,578 square feet from the Service Center out of a total 450,000 square feet area occupied by the Service Center at the facility. Defendant has maintained throughout the action that the two units are separate and should be considered separately on each allegation of discrimination.

The first of these issues, i.e., whether the named female plaintiffs lack standing to litigate allegations of sex discrimination at Installation because they were employed at the Service Center, and of race discrimination in hiring because the named plaintiffs were all successful hirees, will be discussed first. This involves first a determination whether the two units of the defendant, Installation and Service Center, are so separate that the employment practices of one cannot be said to affect an employee or applicant for employment at the other. *Patterson* v. *American Tobacco Co.*, No. 75-1259 (4th Cir. February 23, 1976), supports the Court's conclusion that they are not. As the defendant points out, there are differences between that case and the instant one. In *Patterson* there was under consideration the question of "locations" and not just difference in functions. The issue in the two cases is basically the same, however, and on the most relevant elements to be considered in resolving the issue the circumstances *are* the same. Both Installation and the Service Center draw from the same labor market and in both, at the entry level, no specific skills, aptitudes or prior experience are required, except typing and stenographic skills for secretarial positions. *After* employment, different skills may be required for promotion, and frequent overtime and transfers may be required at Installation, but insofar as hiring is concerned, while not "one and the same" for all purposes, the units have an undeniable nexus.

The second standing inquiry is squarely answered, it seems, by *Barnett* v. *W. T. Grant Company*, 518 F.2d 543, 547 (4th Cir. 1975). Plaintiffs' suit here, as in *Barnett*, is a wholesale attack on various discriminatory employment practices of defendant. The fact that there is not a named plaintiff for each alleged discriminatory practice is not fatal to the claim for relief as a result of that practice. Nor, of course, does it defeat the claim of the class if a named plaintiff cannot prove his own claim. *Brown* v. *Gaston*

County Dyeing Machine Co., 457 F.2d 1377, 1380 (4th Cir. 1972).

Insofar as the second issue is concerned, the Court concludes, as in *Patterson*, that the allegations are of continuing violations of Title VII and § 1981. The challenge here is not just to individual employment practices occurring within the 180 day period prior to the filing of charges with the EEOC under Title VII nor within two years under § 1981 but, on the contrary, is to continuous discrimination extending back beyond those dates. Accordingly the class cannot be limited to those persons who could have filed charges with the EEOC and who could have filed suit under § 1981. *Williams* v. *Norfolk and Western Rwy. Co.*, No. 74-1549 (4th Cir. September 23, 1975).

With respect to the merits of the plaintiffs' claims, the various alleged discriminatory practices mentioned will be discussed in the order heretofore enumerated:

Hiring

In order to establish a *prima facie* case of discrimination in hiring, or in any other employment practice, there must be shown an adverse impact on blacks or women, or both. Plaintiffs have sought to establish and defendant has sought to negate such an initial showing through statistics. In the use of the statistics, however, the parties have differed on the standard against which to measure the employer's hiring practices. The defendant has used census data for the Washington Standard Metropolitan Statistical Area (SMSA) workforce. During 1960-1974, the black percentage of the Washington SMSA has ranged from 22.5% to 26.5%, and the female percentage has ranged from 39.7% to 43.3%.

Using the above figures for comparison, any impact on blacks and women is minimal at most. The statistics show that, for the Service Center:[2]

(1) Of those hired since 1972, 27% have been black, and 40% have been women.

(2) Of those hired since 1965, 25% have been black, and 27% have been women.

(3) As of December, 1975, 41% of the active employees hired since July, 1965 were black and approximately 40% were women.

The statistics for the hiring and retention of blacks in Installation also reveals little, if any, impact:

(1) During the most recent[3] four-year hiring period, 1968-1971, 32% of the persons offered employment and 26% of those who accepted employment were black.

(2) Of those beginning employment since July, 1965, 20% have been black.

(3) Of the installers hired since 1965 who were active in July, 1972 (before the beginning of extensive layoffs), 41% were black.

The statistics offered by the defendant with regard to women in Installation are not so impressive. Sex is not a criterion for employment in Installation, yet there has never been a woman hired in that unit. Defendant argues that plaintiffs have not identified a single woman who applied for or expressed an interest in employment as an installer. This argument fails, at least as far as persuasiveness to the Court is concerned, when it is remembered that when defendant placed job advertisements for instal-

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[2] No new employees have been hired at the Service Center since December, 1974.

[3] No one has been hired as an installer since *1971*.

lers it was in the "Help Wanted—Male" section of the newspaper. This was the source of the majority of applicants for employment at Installation. Moreover, use of the census occupational classification of "operative" to arrive at a 1.9% female workforce availability in the SMSA is suspect because it is agreed that no specific skills or aptitudes, or prior experience, are required to perform entry level jobs at Installation except for typists and secretarial employees.

Plaintiffs contend that, rather than the SMSA, the standard against which to measure an employer's hiring practice is "applicant flow." By this is meant a comparison of those, black or female, who were hired with those who applied to be hired.

Using this standard, i.e., applicant flow, the following is revealed:

(a) Only 12.7% of the black applicants for entry-level jobs in defendant's Service Center from 1970 through 1974 were hired as compared to 29.8% of the white applicants; while 1,489 of the 3,382 applicants (or 44.4%) were black, only 189 of the 754 applicants hired (or 25.1%) were black (Exhibit P-195);

(b) Only 17.9% of the black applicants for entry-level jobs in defendant's installation organization from 1968 through 1971 were hired as compared to 45.7% of the white applicants; while 1,293 of the 2,760 applicants (or 46.8% were black, only 232 of the 903 applicants hired (or 24.7%) were black (Exhibit P-201);

(c) Only 16.9% of the female applicants for entry-level jobs in defendant's Service Center from 1970 through 1974 were hired, as compared to 26.8% of the male applicants; while 1,443 of the 3,511 applicants (or 41.1%) were female, only 244 of the 799 applicants hired (or 30.5%) were female (Exhibit P-196).

Under the circumstances of this case the Court finds that use of the applicant flow standard, where that data is available, is the appropriate and preferable measure. The facility in question is located in Arlington County, Virginia, a largely residential suburb of the District of Columbia. The Washington SMSA includes not only Arlington County, but the District of Columbia, the Cities of Alexandria and Falls Church, the Counties of Fairfax, Loudoun and Prince William in Virginia, and the Counties of Montgomery and Prince Georges in Maryland. This is too large an area to be considered as the area from which an employer, situated as the defendant is here, draws for its labor market. Here the entry level jobs at both units are, except for secretarial employees, for the unskilled, and the census data does not provide an accurate or reliable indication of persons who are available for work in a particular job with a particular employer. Insofar as vocational and occupational data are concerned, the census data does not, of course, take into account existing discrimination. The cases cited by the defendant in support of its contention that the "primary" statistical standard to be used is census data, *Barnett v. W. T. Grant, supra,* and *Brown v. Gaston County Dyeing Machine Co., supra,* just do not support that contention.[4] The question of which standard to use was not an issue in either case, and the Court finds persuasive the language in *Hester v. Southern Railway Co.,* 497 F.2d 1374, 1379 (5th Cir. 1974), that:

> The most direct route to proof of racial discrimination in hiring is proof of disparity between the per-

[4] The Court recognizes, of course, that the "applicant flow" theory has its imperfections. It penalizes an employer's successful affirmative action efforts. Moreover it theoretically is subject to manipulation, although there is no evidence that that occurred here. It also would theoretically penalize blacks or females who, because an employer had a reputation for not employing blacks or females, would be discouraged from applying for employment. Again, however, there is no evidence that this is the situation with this defendant.

centage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position.

497 F.2d at 1379.

From the foregoing the Court finds that statistically there has been an adverse impact on blacks and women in the hiring practices of the defendant. Accordingly, at least a *prima facie* case of discrimination in hiring has been established. *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied* 411 U.S. 939 (1973); *Barnett* v. *W. T. Grant Co., supra* at p. 549. Under now familiar principles the burden is therefore upon the defendant to come forward with legitimate non-discriminatory reasons for what, *prima facie,* is a rejection of employment based on race and sex. *McDonnell Douglas Corp* v. *Green,* 411 U.S. 792, 802 (1973).

At this stage, then, in the "order and allocation of proof" it becomes necessary to consider the individual steps in the process of hiring employed by defendant.

Hiring—Service Center

At the Service Center, a prospective employee signs an application, is interviewed and references are checked. The interviewer selects which applicants are to proceed further. Those selected proceed to pre-employment testing. The interviewer selects which pre-employment test battery or batteries each applicant will take. The interviewer makes the initial determination whether an applicant should be hired based on the individual's application, interview, reference check and test scores. The final decision is made by the Personnel Department Chief. A high school diploma is a factor in the hiring decision, although since November 1966 it has not been required as a condition of employment. While there is a question whether

plaintiffs actually challenge the validity of the Service Center tests in hiring, this is unimportant, for the statistics show (Exs. P-195, 197) that the percentage of blacks and whites *selected for testing* for the years 1970-1974 very closely approximates the percentage of blacks and whites *actually hired.* The Court, from this, finds that the personal interview is the key to defendant's hiring process. These interviews are casual and subjective; all interviewers are white and all except one are male.

Hiring—Installation

No attempt is made by the defendant to justify the lack of females in Installation. It contents itself with the argument that no woman has been shown to have applied or expressed an interest as an installer. As indicated, this is unpersuasive.

At Installation the test is given *prior* to the interview. The factors upon which hiring is based in Installation are the application, performance on the test, an interview, possible reference check, and a medical examination. A high school diploma is a factor in the hiring decision, but has not been a condition of employment since 1968. Here again, the interviewers are all white.

The Installer's Test Battery results do little to help defendant's case, for they show that:

(a) Only 23.5% of the blacks who took the "Installer's Test Battery" from 1968 through 1971 passed, while 57.6% of the whites who took the test battery passed (Exhibit P-203);

(b) The mean test score on the "Installer's Test Battery" for blacks was 151.2 (considerably below the recommended qualifying score of 177), while the mean test score for whites was 177.5 (slightly above the recommended qualifying score) (Exhibit P-203).

The above reveals that the initial test batteries do have an adverse impact on blacks. Consequently the Court must look to determine the test's validity. This validity depends upon whether the test has "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); or in the language of the EEOC Guidelines, whether it is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR § 1607.4(c). The cases on this issue require the Court to conclude that the tests for installers have not been validated. The tests rely on supervisory evaluations as the sole job performance criterion, and the Court cannot ignore the cautionary language in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 433 (1975), that:

> There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind.

422 U.S. at 433. The same deficiencies are present here.

The defendant seeks to minimize the importance of any differential validity study and establishment. Whatever the academic view of differential validity, its requirement in these cases seems fairly well established, *Albermarle Paper Co. v. Moody, supra* at 435; and the EEOC Guidelines clearly mandate it. 29 CFR § 1607.5(b)(5).[5] It has not been established for the Installer test batteries.

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[5] § 1607.5(b)(5):
"Differential validity. Data must be generated and results separately reported for minority and non-minority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups."

Test fairness and practical significance have not been shown, even using, as urged by the defendant, a definition of fairness in terms of the predicted job performance of an individual. The reason for the Court's rejection of defendant's attempted establishment of these elements of the test validation is, again, its dissatisfaction with the method of measuring job performance.[6]

From the foregoing the Court concludes that there has been discrimination by the defendant in hiring of both blacks and females at both the Service Center and Installation.

Job Placement

It may well be that at such time as monetary relief is considered, there may be no identifiable members of the class who have suffered from the total absence of black

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[6] The difficulty of such measurement is not underestimated or unappreciated by the Court. Nor is the Court unaware of the view that in the "real world" judgmental measures such as supervisory ratings are more reliable than so-called "objective" criterion measures, or the view that elimination of supervisory ratings would be a severe blow to industry efficiency. The Court has no desire to condemn judicially supervisory ratings. What the Court does feel, however, is that such ratings must be carefully collected and standardized to the largest extent possible. Evidence as to this in the test validation as well as in promotion, discussed *infra*, is lacking here.

and female employees in the shop trades in the Service Center. The same may prove to be the case with regard to the absence of female employees in warehouse jobs in the Service Center, and of blacks in the office jobs at the Service Center prior to 1963. Sex is not a bona fide occupational qualification for employment in the shop trades or warehouse, and such absences of females and blacks surely warrant at least injunctive relief in the absence of some satisfactory explanation. None has here been forthcoming.

Promotion—Service Center

Within Hourly Positions

Promotion within hourly positions is done strictly by departmental seniority unless an individual is determined to be unqualified. As yet, no one has ever been found to be unqualified.

The potential problem with this scheme of promotion is that it perpetuates past discrimination and reflects discrimination in original hiring. The fact that promotions are always made from within the particular section in which the vacancy occurs adds to this, since transfer among sections is prohibited. However the Court does not find any discrimination in the *system* of promotion.

Hourly to Salaried Non-Supervisory

Promotion of hourly workers to salaried non-supervisory positions is made from a list of recommended employees. The initial recommendation to place an employee upon the list is made by the section chief. This recommendation is reviewed by two higher supervisory levels. The specific promotion recommendation is made by an advancement committee but sometimes by the section chief. The final decision to promote is made by the assistant manager and manager.

The statistics support, and the Court finds an adverse impact on blacks and females and discrimination in this class of promotion (Plaintiff's Proposed Findings of Fact ¶¶ 104-110). The promotional procedure itself is supportive of the Court's findings, because an employee cannot be promoted unless he is placed upon the list and the only way that can be done is by the section chief. Section chiefs are given no written guidelines for this task and the factors employed by the section chiefs are necessarily vague and subjective. Additionally, vacancies are not posted and there is no way for an individual to apply for a particular position. The section chief's decision is final and unreviewable. Apparently, scores achieved on the Clerical Test Battery are one of the promotion criterion and the plaintiffs further contend that these tests have not been validated for this purpose. The defendant, however, claims that these tests are used as a criterion only for those clerical positions for which the tests have been validated on the entry-level. The Court does not need to pass on the tests' validity; for the use of the tests, designed for entry-level evaluation, even only as a criterion, is not a proper factor for consideration in promotion.

Within Salaried Non-Supervisory

Plaintiffs introduced no evidence concerning this category of promotions.

Non-Supervisory to Supervisory

Supervisory promotions are made from a Management Potential Inventory. In order to be listed, an employee must first complete a request form. Annually, all supervisors meet and there determine who shall be placed upon the list. The actual promotion decision is made and reviewed up four levels of supervisory command.

The statistics from 1965 support a charge of discrimination (Exhibit P-243). In addition, the promotion procedure

is subject to most of the same objections as "hourly to Salaried Non-Supervisory." The process is basically informal and non-structured. There are no written guidelines for evaluating potential supervisory personnel and the promotion decision is based upon the subjective evaluations of supervisors. The process is secret—vacancies are not posted and no one is allowed to "apply" for a job, only the list.

The defendant seeks to offset the plaintiff's statistics with statistics of its own. No one has been promoted since 1972. In 1972, five people—including 1 black and 2 females —were promoted. Defendant claims that the overall disparate statistics are due to the fact that generally, only those employees with ten or more years of experience are promoted. Only one person hired since 1965—a woman—has been promoted to supervisor. Nevertheless, the statistics are such that they cannot be explained away in this manner. They result, the Court finds, from past discrimination, and warrant, at the very least, injunctive relief.

Promotion—Installation

Hourly Positions

Advancement within the hourly positions is governed, pursuant to collective bargaining, by an "Index Plan." The employee must be qualified at the next index level before he is promoted to that level. Each employee's index classification is reviewed every six months at a conference of the department chief and other supervisors. The index decision is based upon the number of hours worked at the next index level and demonstrated skills. This conference recommends upgradings which are reviewed at a conference composed of department chiefs and the installation manager.

The statistics concerning the mean time needed to advance from one index level to the next and the level of

advancement for all *continuously employed* workers supports a charge of discrimination. However, the statistics of all those installers *hired* refute the charge. Defendant also attacks the much smaller sample employed by the plaintiffs for their statistics.

The actual upgrading procedure is subject to several challenges, e.g., the ability to qualify for upgrading depends in large measure upon being assigned the necessary work at the next index level. Assignment of particular jobs is discretionary with the supervisors and affords the opportunity of favoritism. The supervisory judgment of whether or not an installer is "qualified" at the next index level is also subject to abuse although, at least nominally, this judgment should largely depend upon an objective criterion—experience. However, aside from the written descriptions of necessary job skills at each index level, there are no written guidelines concerning how work should be assigned or how to determine whether or not an installer is "qualified" for the next index level. The Court finds, however, that though the possibility of abuse exists, there is no discrimination in promotion of blacks in hourly positions in Installation. Any lack of blacks in those positions stems, not from discrimination in promotion but in the original hiring, the result of which, coupled with the lack of *any* hiring since 1971 and large layoffs beginning then, may tend to perpetuate any lack of blacks in the higher jobs. Blacks hired as Installers have had a lower attrition rate than whites, a factor which does not reflect adversely on the defendant. This, of course, is reflected in an increase in the overall black employment in Installation. The promotion process, however, is not discriminatory.

Supervisory Positions

Annually, the department chiefs and the district manager select names of non-supervisory employees and place

them on a Management Potential Inventory. When a supervisory vacancy occurs, an employee is selected from this list to fill it.

The statistical evidence supports a finding of discrimination. There has only been one black and no female supervisors. The defendant once again asserts that length of employment is the basic criterion for promotion. In addition, there have been only five promotions since 1970 and none since 1973. In fact, since 1972 there has been a net downgrading from supervisory to hourly of 28 positions.

The objections to the actual promotion procedure are similar to those for the Service Center. An employee must be recommended to be placed upon the Management Potential Inventory; and this decision is unstructured and subjective. Again, as in the case of the Service Center, injunctive relief is warranted.

Layoffs

Layoffs in Installation, as governed by a collective bargaining agreement, have been, with the exception of a 10% exemption provision, in the inverse order of employment seniority. Since the layoff process, facially neutral, can only be applicable to one who is already hired, it cannot be said to perpetuate the effects of past discrimination. *Watkins v. United Steel Workers, Local 2369,* 516 F.2d 41 (5th Cir. 1975). Even though disproportionately affected, therefore, blacks in Installation are not discriminated against by the process. *Chance v. Board of Examiners,* —— F.2d —— (2nd Cir. January 19, 1976).

Nor has the 10% retention option given the employer had an adverse impact on blacks. The stipulated evidence is that of the 288 Installers laid off during 1971-1975, the period of massive layoffs by the defendant, a total of 18 persons have been retained under the 10% exemption. Of

these, seven (7) are black. This is too small a number from which the Court can find any discrimination.

Maternity Benefits

This issue, though decided in the plaintiffs' favor in *Gilbert v. General Electric Co.,* 519 F.2d 661, (4th Cir. 1975), *cert. granted,* —— U.S. ——, has been presented in that case to the Supreme Court. In view of the expected announcement by that Court of its decision, this Court will defer ruling on the issue.

Conclusion

The Court adopts, in addition to the foregoing, as its findings of fact the Joint Stipulation filed by the parties, Plaintiffs' Proposed Findings of Fact 1, 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 (omitting the reference to "Clerical Test Battery"), 18, 19, 20 (omitting the last sentence), 21, 22, 23, 24 (omitting the last sentence), 25, 26, 27, 28, 29, 30, 32, 33, 35, 38, 41, 42, 43, 44, 50, 51, 52, 53, 61, 62, 64, 65, 71, 72, 73, 74, 77, 81, 82, 83, 84, 86, 87, 88, 89, 90, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 104, 105, 107, 108, 111, 112, 113, 114, 117, 118, 119, 121, 154, 155, 156, 157, 158, 159, 161, 162, 163, 164, 165, 166, 167, 169, 170, 171, 172, and Defendant's Proposed Findings of Fact 41, 42, 45, 46, 47, 67, 68, 69, 70, 71, 73, 74, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107, 170, 171, 172, 173, 174.[7]

The Court accordingly concludes that there has been discrimination against blacks and females in hiring, job placement, promotions from hourly to salaried non-supervisory personnel and from non-supervisory to supervisory

[7] No finding is made with reference to the defendant's affirmative action efforts to hire blacks because, although the evidence supports a finding that there were such, the evidence is far from persuasive that such efforts resulted in employment of blacks who were retained for any length of time.

personnel; that there has been no such discrimination in promotions within the hourly positions or in layoffs; and that the decision as to discrimination with respect to maternity benefits should be deferred.

Counsel for the plaintiffs should prepare a decree embodying by reference the foregoing, and present the same for entry after submission to counsel for defendant for approval as to form. The decree should also provide for dismissal of the allegations of discrimination in providing training school opportunities or sickness benefits and of harassment of those who assert rights pursuant to Title VII. At the same time counsel for both sides should present decrees, with such supporting briefs as desired, awarding injunctive relief, making provision for the notice to members of the class pursuant to F. R. Civ. P. 23(b)(3) with regard to monetary relief, and providing for the extent as well as the method of calculation and distribution of any monetary relief.

ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
April 30th, 1976

PLAINTIFFS' PROPOSED FINDINGS OF FACT ADOPTED BY THE COURT

1. Plaintiffs are black and female employees and former employees at Defendant's facility in Arlington, Virginia. On May 14, 1975, they filed a Complaint on behalf of themselves and on behalf of a class of black and female employees, former employees, and applicants for employment, alleging that Defendant has discriminated and continues to discriminate against black and female employees, and against black and female applicants for employment, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq.*) and Section 1 of the Civil Rights Act of 1866 (42 U.S.C. § 1981).

2. On November 21, 1975, the Court entered an Order permitting Plaintiffs to maintain this action as a class action. The Order specified that the class which Plaintiffs represent consists of:

> "All black persons and all female persons who are, have been, or will be employed by Defendant at Defendant's facility in Arlington, Virginia, at any time since July 2, 1965; and all black persons and all female persons who have applied for employment at Defendant's facility in Arlington, Virginia, since July 2, 1965, or who will hereafter apply."

8. Defendant's installation organization did not hire blacks either for hourly-rated or salaried positions prior to 1963. (Joint Stipulations 61, 62). Although blacks applied for jobs with the installation organization prior to 1963, "[t]here was a practice not to hire blacks as installers." (Exhibit P-264, Haag Dep., p. 32).

9. Defendant's service center did not hire blacks for salaried positions prior to 1963. (Joint Stipulation 49). Prior to 1961, Defendant did not hire blacks for any positions in the shop of its service center. (Joint Stipulation

50). Until 1961, blacks were hired only as warehousemen or janitors. (Exhibits P-39, P-40).

10. The following statistics show the number of black and white applicants for entry-level jobs with Defendant's service center, the number hired, and the percent hired, from 1970 through 1974. (Exhibit P-195):

	Number of Applicants	*Number Hired*	*Percent Hired*
1974: Blacks	121	22	18.2
Whites	173	66	38.2
1973: Blacks	138	24	17.4
Whites	138	50	36.2
1972: Blacks	229	33	14.4
Whites	241	89	36.9
1971: Blacks	393	39	9.9
Whites	510	145	28.4
1970: Blacks	608	71	11.7
Whites	831	215	25.9
Total 1970-1974:			
Blacks	1,489	189	12.7
Whites	1,893	565	29.8

11. These statistics show that, from 1970 through 1974:

a. Only 12.7% of the black applicants for entry-level jobs in Defendant's service center were hired as compared to 29.8% of the white applicants; and that 1,489 of the 3,382 applicants (or 44.4%) were black, while only 189 of the 754 applicants hired (or 25.1%) were black. (Exhibit P-195);

b. It is stipulated that no specific skills or aptitudes, and no prior experience, are required to perform the entry-level jobs in the service center (Joint Stipulation 32); accordingly, the foregoing statistical disparities cannot be

explained by any difference in skills or experience between black and white applicants (Haimes, I-33); Defendant offered no evidence to explain these statistical disparities.

12. The following statistics show the number of black and white applicants for entry-level jobs with Defendant's installation organization, the number hired, and the percent hired, from 1968 through 1971. (Exhibit P-201):

	Number of Applicants	*Number Hired*	*Percent Hired*
1971: Blacks	43	10	23.3
Whites	115	71	61.7
1970: Blacks	158	11	7.0
Whites	267	118	44.2
1969: Blacks	508	76	15.0
Whites	542	193	35.6
1968: Blacks	584	135	23.1
Whites	543	289	53.2
Total 1968-1971:			
Blacks	1,293	232	17.9
Whites	1,467	671	45.7

13. These statistics show that, from 1968 through 1971:

a. Only 17.9% of the black applicants for entry-level jobs in Defendant's installation organization were hired as compared to 45.7% of the white applicants; and that 1,293 of the 2,760 applicants (or 46.8%) were black, while only 232 of the 903 applicants hired (or 24.7%) were black. (Exhibit P-201).

b. It is stipulated that no specific skills or aptitudes, and no prior experience are required to perform the entry-level jobs in the installation organization (Joint Stipulation 51); accordingly, the foregoing statistical disparities cannot be explained by any difference in skills or experience between black and white applicants. (Haimes, I-33).

14. The following statistics show the number of female and male applicants for entry-level jobs with Defendant's service center, the number hired, and the percent hired, from 1970 through 1974. (Exhibit P-196):

	Number of Applicants	*Number Hired*	*Percent Hired*
1974:			
Females	151	43	28.5
Males	172	50	29.1
1973:			
Females	138	29	21.0
Males	149	47	31.5
1972:			
Females	219	45	20.5
Males	273	82	30.0
1971:			
Females	366	46	12.6
Males	568	140	14.6
1970:			
Females	569	81	14.2
Males	906	236	26.0
Total 1970-1974:			
Females	1,443	244	16.9
Males	2,068	555	26.8

15. These statistics show that, from 1970 through 1974:

a. Only 16.9% of the female applicants for entry-level jobs in Defendant's service center were hired, as compared to 26.8% of the male applicants; and that 1,443 of the 3,511 applicants (or 41.1%) were female, while only 244 of the 799 applicants hired (or 30.5%) were female. (Exhibit P-196).

b. It is stipulated that no specific skills or aptitudes, or prior experience, are required to perform the entry-level jobs in the service center (Joint Stipulation 33); accordingly, the foregoing statistical disparities cannot be explained by any differences in skills or experience between female and male applicants. (Haimes, I-33). Defendant offered no evidence to explain these statistical disparities.

16. The statistics set forth in Findings 10-15, *supra*, demonstrate that black applicants have been rejected at a far higher rate than white applicants, and that female applicants have been rejected at a far higher rate than male applicants. (Haimes, I-18). Consequently, Defendant's hiring practices have had an adverse impact on blacks and females. (Haimes, I-18).

17. The adverse impact of Defendant's hiring practices on blacks is caused by: (a) the personal interviews which Defendant requires each applicant to undergo (Haimes, I-19); (b) Defendant's use of high school education as a criterion in hiring (Haimes, I-29); and (c) Defendant's use of an applicant's scores on the pre-employment "Installer's Test Battery" [and "Clerical Test Battery"] as criteria in hiring. (Haimes, I-30, 45). The adverse impact of Defendant's hiring practices on females is caused by: (a) the personal interview (Haimes, I-19); and (b) Defendant's policy of excluding females from employment as installers. (Exhibit P-264, Haag Dep., p. 26).

18. Applicants for employment with Defendant in its service center are required to undergo a personal interview before the pre-employment testing stage of the hiring process. (Joint Stipulation 36). Based on this interview, Defendant's interviewers select only certain applicants to be tested; those not so selected by the interviewers are summarily rejected. (Joint Stipulation 38; Haimes, I-20).

19. The following statistics show the number of black and white applicants for employment with Defendant in

its service center, the number selected for testing on the basis of the personal interview, and the percent selected for testing from 1970 through 1974. (Exhibit P-197):

	Number of Applicants	*Number Selected For Testing*	*Percent Selected For Testing*
1974: Blacks	121	22	18.2
Whites	173	65	37.6
1973: Blacks	138	28	20.3
Whites	138	55	39.9
1972: Blacks	229	31	13.5
Whites	241	73	30.3
1971: Blacks	393	30	7.6
Whites	510	129	25.3
1970: Blacks	608	107	17.6
Whites	831	250	30.1
Total 1970-1974:			
Blacks	1,489	218	14.6
Whites	1,893	572	30.2

20. These statistics show that, from 1970 through 1974, only 14.6% of the black applicants were selected for testing on the basis of Defendant's personal interview, as compared to 30.2% of the white applicants. (Exhibit P-197). [Defendant offered no evidence to explain this statistical disparity.]

21. The percent of black and white applicants selected for testing is nearly identical to the percent of black and white applicants hired, in each year from 1970 through 1974 (Exhibits P-195, P-197; Haimes, I-21, 22).

	Percent Selected For Testing	*Percent Hired*
1974: Blacks	18.2	18.2
Whites	37.6	38.2
1973: Blacks	20.3	17.4
Whites	39.9	36.2
1972: Blacks	13.5	14.4
Whites	30.3	36.9
1971: Blacks	7.6	9.9
Whites	25.3	28.4
1970: Blacks	17.6	11.7
Whites	30.1	25.9
Total 1970-1974:		
Blacks	14.6	12.7
Whites	30.2	29.8

22. The similarity between the number of those selected for testing and those actually hired demonstrates that the personal interview is the key stage in Defendant's hiring process because, if the applicant is selected for pre-employment testing on the basis of this interview, it is almost certain that he or she will be hired. (Haimes, I-21, 22).

23. Applicants for employment with Defendant in its installation organization are required to undergo a personal interview after taking the pre-employment installer test battery. (Joint Stipulation 56).

24. The following statistics show the number of black and white applicants who failed Defendant's pre-employment installer test battery, and the number and percent

of these test-failers who were hired anyway from 1968 through 1971. (Exhibit D-102):

White Failers	*White Failers Hired*	*Black Failers*	*Black Failers Hired*
564	65 [11.5%]	971	55 [5.7%]

Defendant offered no evidence to explain the statistical disparity in hiring rates for black and white test-failers.

25. The foregoing statistics indicate that Defendant's personal interview, conducted after the pre-employment "Installer's Test Battery" is taken, affords white applicants a greater opportunity than blacks to overcome poor test performance and, consequently, "is responsible for this two [whites] to one [black] rate in those who failed the test being hired." (Haimes, I-23).

26. There are three reasons why Defendant's personal interviews have an adverse impact on black and female applicants for employment: (a) Defendant's interviews are highly subjective and very casual (Haimes, I-23, 24); (b) all of Defendant's interviewers have been white and all but one have been male (Haimes, I-28; Exhibit P-252, Mamola Dep., pp. 90-91); and (c) there have been no controls on the interview process to prevent race or sex discrimination by the interviewers, intentional or unintentional. (Haimes, I-28, 29).

27. Defendant's interviewers make highly subjective judgments about the suitability of applicants for employment, relying, for example, on an applicant's "appearance," "aspirations," and degree of "work motivation." (Haimes, I-24). The use of such subjective criteria, and the casual nature of Defendant's personal interviews, are revealed in the deposition testimony of two of Defendant's principal interviewers, Betty J. Davidson, Section Chief of Personnel in the service center (Exhibit P-262), and William M. Haag, former Employment Supervisor in the installation organization (Exhibit P-264), and in Defendant's Notes of Interviews for the years 1974, 1973 and 1968-1969. (Exhibits P-174, P-175 and P-176).

28. When Mrs. Davidson interviews applicants, she asks them, among other things, various questions regarding "their aspirations" and "their hobbies and likes and dislikes, their military background." From an applicant's "desires and aspirations," Mrs. Davidson makes a determination as to how "work motivated" the applicant is. (Exhibit P-262, Davidson Dep., p. 170). Mr. Haag regarded the "qualifications for employment" as: "Appearance; general health; education; employment record; the service record if a veteran; criminal record, if any. That's about all I can pull out of the hat." Mr. Haag's interviews were relatively short, but he always tried to make an assessment of the desire an applicant had for the job and the applicant's motivation in determining whether the applicant should be hired. (Exhibit P-264, Haag Dep., pp. 15, 27-28).

29. Notes of Interviews are made by Defendant's interviewers concerning each applicant interviewed. (Joint Stipulation 36). Notes such as the following are illustrative of the subjective criteria relied on by Defendant's interviewers. (Exhibit P-176):

> "Avg. app.—not very well motivated—nice appearance, but lacks firm goals in life—told him could offer nothing at this time." (Black male, 7-31-69)
>
> "Below avg. app.—Slouched in chair and mumbled the whole interview—not really interested in working—interested in money only. Would not recommend at this time." (Black male, 7-21-69)
>
> "App. interested only in money. Has tried to get GED on and off in school. Mentioned 1-Y classification (re: something in his blood?) skinny and not too healthy looking. Consider with app. of equal qualifications." (Black male, 7-7-69)

30. Casual and subjective interviews contain a great deal of potential for abuse. Such interviews facilitate unreliable

and invalid judgments which can disadvantage minority and female applicants. Even among the most well-intentioned interviewers, racial and sexual stereotypes or unreliable subjective judgments can be made, judgments which can be shown statistically to disadvantage minorities. (Haimes, I-27).

32. The use of vague, subjective criteria (such as "work motivation") by Defendant's interviewers has, in fact, "operated in a disparate manner to impact negatively on black applicants." (Haimes, I-25). "Work motivation" appears frequently in Defendant's Notes of Interviews as a criterion used in hiring. (Exhibits P-174, P-175). In 1973, 50% of the applicants for employment with Defendant in its service center were black and 50% were white; of those noted as being "work motivated," only 38% were black—however, of those noted as being "not work motivated," 83% were black. (Haimes, I-25).

33. Defendant's own Interviewer's Manual (Exhibit P-36), condemns the use of "work motivation" as an "invalid" employment criterion. Specifically, the Interviewer's Manual states that "some criteria are *invalid* because they are *too subjective* to have a meaningful bearing on predictions of job performance, including: poor personality, immaturity, emotional instability, *work motivation*, etc. None of these can be accurately measured by the employment interviewer." (Emphasis added.) (Exhibit P-36, p. T4-11).

35. It is stipulated that all of the persons who have conducted interviews are white (Joint Stipulations 36, 56); and there is uncontradicted testimony that all but one have been male. (Exhibit P-252, Mamola Dep., pp. 90-91). The fact that all of Defendant's interviewers have been white, and all but one have been male, has heightened the potential for unreliable subjective judgments to be made on the basis of invalid racial and sexual stereotypes to the disadvantage of black and female applicants. "The black applicants being interviewed by a white interviewer might appear restrained and somewhat unaggressive in the interview situation, and

[this] could be due to the interpersonal relationship of a black person with a white man or a white woman. Yet, the interviewer can conclude that this restrained behavior might be a sign of poor motivation for work, and therefore undervalue the performance ability of the black applicant." (Haimes, I-28).

38. Defendant has submitted no evidence to show whether or not the fact that an applicant has graduated from high school is related to performance of any of Defendant's jobs. In fact, the only evidence introduced on this point suggests that graduation from high school is not related to job performance. John O. King, Manager of Defendant's installation organization, testified that there have been supervisors who have not had a high school education, and that graduation from high school is "not necessarily" helpful in performing the tasks of section chief. (Exhibit P-263, King Dep., pp. 35-36; King, II-144).

41. The following statistics show the number of black and white applicants tested, their mean test scores, the number who passed, and the percent who passed, from 1968 through 1971. (Exhibit P-203):

	Tested	*Mean Score*	*Passed*	*Percent Passed*
1971: Blacks	43	161.4	17	39.5
Whites	84	183.1	55	65.5
1970: Blacks	159	152.2	39	24.5
Whites	224	180.5	138	61.6
1969: Blacks	480	149.8	111	23.1
Whites	504	175.9	274	54.4
1968: Blacks	587	151.5	131	22.3
Whites	519	176.6	300	57.8
Total 1968-1971:				
Blacks	1,269	151.2	298	23.5
Whites	1,331	177.5	767	57.6

42. These statistics show that, from 1968 through 1971:

a. Only 23.5% of the blacks who took the test passed, while 57.6% of the whites who took the test passed;

b. The mean test score for blacks was 151.2 (considerably below the recommended qualifying score of 177), while the mean test score for whites was 177.5 (slightly above the recommended qualifying score). (Exhibit P-203).

43. The following statistics show the number of blacks and whites who failed the test, the number of those who failed but were hired anyway, and the percent of test-failers who were hired, from 1968 through 1971. (Exhibit P-204):

	Failed	*Failed but Hired*	*Percent of Failed Who Were Hired*
1971: Blacks	26	0	0.0
Whites	29	0	0.0
1970: Blacks	120	0	0.0
Whites	86	5	5.8
1969: Blacks	369	11	3.0
Whites	230	19	8.3
1968: Blacks	456	44	9.6
Whites	219	41	18.7
Total 1968-1971:			
Blacks	971	55	5.7
Whites	564	65	11.5

44. These statistics show that, from 1968 through 1971:

a. Very few persons who failed the test—only 5.7% of the blacks and only 11.5% of the whites—were hired (Exhibit P-204); consequently, "the passing of the test battery is a precondition for employment," (Haimes, I-22-23);

b. "The major criterion for employment in the Installation Organization was the passing of this installer test battery." (Haimes, I-31).

50. Defendant has twice collected job performance data for use in test validity studies of the "Installer's Test Battery." Data collected in 1963-64 were analyzed in separate reports in 1964, 1965 and 1973. (Lockwood, II-224-225).

51. An additional study of the "Installer's Test Battery," which was commenced in 1975, was not complete at the time of trial—although a preliminary report had been prepared dealing solely with data gathered from the Washington Installation Area. (Exhibit D-100). In addition, Defendant's Department Chief of Personnel Testing and Selection gave testimony concerning certain other preliminary data available from this study. (Lockwood, II-238-244).

52. All of the validity studies relating to the "Installer's Test Battery" were conducted by Defendant's employees. (Lockwood, III-4-5).

53. Defendant's validity studies fail to establish either the validity or the utility of the "Installer's Test Battery" because (i) the studies rely on subjective supervisory evaluations as the exclusive criterion by which job performance was measured, without sufficient protection against or examination for supervisory bias; (ii) the "differential validity" of the test battery for blacks is not proved; (iii) the "fairness" of the test battery for blacks is not proved; and (iv) there is no proof of the "practical significance" of the test battery. Detailed findings with respect to these issues are set forth in Section IX of these Findings of Fact.

61. Sex is not a bona fide occupational qualification for the position of installer (Joint Stipulation 60). Nevertheless, Defendant admitted that its policy, at least through

1971, was not to hire females as installers. (Exhibit P-264, Haag Dep., p. 26).

62. The effects of this policy are shown in the following statistics, which show the number of installers, and the number of female installers, employed during each year from 1965 through 1975. (Exhibit P-213):

	Total Installers	*Female Installers*
1975	334	0
1974	390	0
1973	402	0
1972	430	0
1971	511	0
1970	533	0
1969	583	0
1968	575	0
1967	578	0
1966	553	0
1965	582	0

64. Whenever Defendant placed advertisements in the newspaper to hire installers, the advertisements appeared in the "Help Wanted, Male" section of the want ads; no such advertisements have ever been placed in the "Help Wanted, Male-Female" section, or the "Help Wanted, Female" section. (Joint Stipulation 54; Exhibit P-24).

65. By placing job advertisements only in the "Help Wanted, Male" section of the newspaper, Defendant "failed to give proper notice to women in the labor market as to the availability of job opportunities for them. In addition, should a woman, or some women, have seen . . . this advertisement . . . they would have been discouraged from applying for employment as the ad was only run under the Help Male column." (Haimes, I-32; Haber, I-98).

71. Where data on the number and percent of blacks and whites who actually applied for employment with a particular employer are available, such data furnish the most accurate and reliable basis for determining the number and percent of blacks who, absent discrimination, should have been hired. (Haimes, I-50; Haber, I-82, 89). Absent discrimination, the percent of blacks among those hired should approximate the percent of blacks among those who applied. (*Id.*) (*See also Hester v. Southern Railway Co.*, 497 F.2d 1374, 1379 (5th Cir. 1974); *Green* v. *Missouri Pacific Railway Co.*, 523 F.2d 1290, 1294 (8th Cir. 1975).) For example, if 50% of those who apply for work with a particular employer are black, then approximately 50% of those hired should be black. (Haimes, I-50).

72. This is especially true where, as here, the employer hires workers for unskilled, entry-level jobs. (Haimes, I-50; Haber, I-82, 89). The total supply of labor available to a particular employer is defined as consisting of those persons who are qualified and willing to work at the employer's wage rates and working conditions. (Haimes, I-49-50, 60-61; Goldstein, II-198; Haber, I-89). Where, as here, the job to be filled is entry-level, and where no prior experience or specific skills or aptitudes are required, the supply of labor available to the employer for that job consists precisely of those persons who actually apply for the job. (Haimes, I-50; Haber, I-82, 89). Consequently, when such data are available, the most accurate measure of the availability of blacks for an employer's unskilled, entry-level jobs is the percent of blacks among those who actually applied for these jobs. (Haber, I-82-83).

73. Census occupational data only report the number of persons presently employed in certain job categories in a predetermined geographical unit. (Haber, I-84, 89-90). These data are incomplete; Defendant's own expert witness, Harold Goldstein, testified that "The census data that we have does not fully define the labor supply for the oc-

cupation." (Goldstein, II-198-199). Mr. Goldstein testified that census data do not show who is "capable, qualified, and interested [in work] at the current work rate and work conditions." (Goldstein, II-199).

74. There are many inaccuracies contained in census occupational data:

a) Blacks and females in the labor supply are underreported in the census occupational data: Defendant's expert testified that blacks are more frequently undercounted, *i.e.*, omitted from the census, than whites and that young black males are more frequently undercounted than other blacks. (Goldstein, II-199-200). Specifically, the undercount approximates three to five percent for the population at large, but may be as high as 20 percent for young black males. (Goldstein, II-200-202).

b) The fact that the percentage of unemployed blacks is higher than the percentage of unemployed whites and the percentage of unemployed females is higher than the percentage of unemployed males also contributes to the underreporting of blacks and females in census occupational data (Haber, I-91). Unemployed persons are, by definition, not employed in a particular job category; accordingly, they are not reported in census occupational data, even though they are part of the labor supply. (Haber, I-91).

c) Census data does not account for underemployment, *i.e.*, employment of a person in a job below his skill level because of his inability to get a job utilizing his skills. (Goldstein, II-202-203). As Defendant's expert testified, "If a worker has a skill, but employers discriminate against the people of his race or whatever or sex and don't hire him, then he may have to take a job at a lower skill." (Goldstein, II-203-204).

d) Census occupational data excludes a large portion of the labor supply: A substantial proportion of the available

work force consists of new entrants with no previous work experience or occupational attachments; these people, as well as those presently unemployed, are excluded from census occupational data. (Haber, I-90-91).

e) Errors in what employed persons report their occupations to be, which may approach 25 percent, also result in the exclusion from, or inaccurate inclusion of, a significant portion of the labor supply. (Goldstein, II-205-209).

f) Census occupational data do not even purport to measure a particular employer's labor supply: Census occupational data are only available for predetermined geographical census units—like Standard Metropolitan Statistical Areas—which do not necessarily correspond to the geographic area from which a particular employer actually draws its work force. (Haber, I-84-85). Even if an employer located in Arlington, Virginia, drew its work force from the entire Washington SMSA, it would be highly unlikely that it would draw applicants in the same numbers or percentages from Gaithersburg or the West Virginia border as from Alexandria or the District of Columbia. (Haber, I-86). Studies of commuting patterns of blue collar workers show that most employees commute less than 10 miles to work, and that the farther a worker lives from a particular plant, the less likely it is that he or she will be employed there. (Haber, I-86, 88).

g) Census occupational data give no indication of willingness to work for a particular employer: Census data give no indication of the interest of individuals in particular jobs. (Haber, I-89). Only data on the persons who actually apply for employment with a particular employer can show this. (Haber, I-89).

77. Defendant has made no affirmative efforts to hire females for the job of installer. (King, II-146).

81. No blacks and no females have ever been employed by Defendant on a regular basis in a shop trades job in the

service center. (Joint Stipulations 47, 48). The following statistics show the number of white males, blacks and females employed in shop trades jobs on December 31 of each year from 1965 through 1974. (Exhibits P-207, P-208):

	White Males	*Blacks*	*Females*
1974	26	0	0
1973	28	0	0
1972	31	0	0
1971	29	0	0
1970	29	0	0
1969	28	0	0
1968	25	0	0
1967	27	0	0
1966	26	0	0
1965	25	0	0

82. The following statistics show the number of white males, blacks, and females newly-assigned to shop trades jobs in each year from 1965 through 1974. (Exhibits P-209, P-210):

	White Males	*Blacks*	*Females*
1974	1	0	0
1973	0	0	0
1972	3	0	0
1971	1	0	0
1970	3	0	0
1969	5	0	0
1968	0	0	0
1967	0	0	0
1966	3	0	0
1965	2	0	0

83. Newly-hired employees assigned to jobs in shop trades are effectively guaranteed to be upgraded from Grade 1 to Grade 3 within 60 months. (Joint Stipulations 99, 100).

84. By contrast, it takes an average of 86.2 months for employees in other shop jobs to be upgraded from Grade 1 to Grade 3. (Exhibit P-234). Plaintiff Minnie Marable has been employed by Defendant for 117 months and still holds a Grade 2 position. (Marable, II-17). Because of the greater opportunity for advancement in shop trades, she testified that she requested of her supervisors, on several occasions between 1969 and 1972, that she be transferred to a job in shop trades. (Marable, II-22, 30-31). However, she was never informed about the existence of any vacancy in shop trades, she was never interviewed as to her interest in shop trades, and she was never transferred. (Marable, II-23).

86. Based on the foregoing, black and female employees have been excluded from shop trades jobs and this exclusion has severely restricted these employees in their opportunities for advancement to higher grades and for increased earnings commensurate with such grades. (Joint Stipulations 99, 100; Exhibit P-234; Marable, II-17).

87. Sex is not a bona fide occupational qualification for employment in the warehouse of Defendant's service center. (Joint Stipulation 45). From at least 1960 until 1972, no females were employed in the warehouse; only one female has been employed in the warehouse and she was not hired until 1972. (Joint Stipulation 43; Exhibit P-205).

88. The absence of females in the Defendant's warehouse contrasts with the presence of at least five females employed by the Chesapeake and Potomac Telephone Company ("C&P") at 1201 South Hayes Street, Arlington, Virginia, in a warehouse area immediately adjacent to the area where warehouse employees of the service center work, performing operations similar to some of those performed by service center warehouse employees. (Joint Stipulation 46).

89. The following statistics show the number of males and females employed in the warehouse on December 31 of each year from 1965 through 1974. (Exhibit P-205):

	Males	*Females*
1974	108	1
1973	113	1
1972	117	1
1971	128	0
1970	130	0
1969	137	0
1968	127	0
1967	101	0
1966	97	0
1965	59	0

90. The following statistics show the number of males and females newly hired for warehouse jobs in each year from 1965 through 1974. (Exhibit P-206):

	Males	*Females*
1974	0	0
1973	13	0
1972	19	1
1971	26	0
1970	49	0
1969	88	0
1968	97	0
1967	62	0
1966	82	0
1965 (July through December)	15	0

92. Prior to 1972, it was Defendant's policy not to place females in the warehouse. For example, in Section VIII of a survey questionnaire circulated by Defendant's corporate headquarters and completed by service center officials, captioned "Equal Opportunity for Women," the following question was asked:

> "ARE THERE ANY OCCUPATIONS FOR WHICH WOMEN ARE NOT CONSIDERED? IF YES, WHAT ARE THE OCCUPATIONS AND GIVE REASONS WHY THEY ARE NOT CONSIDERED."

The following answer was given:

> "At the present time, consideration is not given to women in regards to the following occupations:
>
> Warehouseman
>
> Tradesman
>
> Maintenance Mechanic
>
> "Due to the types of work involved in the above, women have not been considered." (Exhibit P-13, p. 9).

93. Defendant's policy of excluding females from the warehouse is further set forth in a letter from R. L. Hoagland, a service center supervisor, to Barbara R. Simpsom of the EEOC, dated November 28, 1966. On page 4 of the letter, Mr. Hoagland wrote that the "basic requirements for positions with Western Electric Company" are:

> "Shop and Warehouse—Male or Female (*no females in the Warehouse*), high school graduate, good references . . . ." (Exhibit P-74).

94. Since 1964, newly-hired employees assigned to jobs in the warehouse have effectively been guaranteed upgrading from Grade 1 to Grade 3 within 60 months. (Joint Stipulations 95, 96; Bowden, II-109-110). As a result, warehouse jobs assure a greater opportunity for advancement to Grade 3 than positions in shop nontrades.

95. Plaintiff Marable testified that she requested of her supervisors, on several occasions between 1966 and 1970, that she be transferred to a job in the warehouse. She was never transferred. (Marable, II-17, 28, 29).

97. Defendant did not hire blacks for office jobs in its service center prior to 1963. (Joint Stipulation 49).

98. The following statistics show the percent of service center employees who were black, and the percent of service center office employees who were black, from 1965 through 1975. (Exhibits P-211, D-12A):

	Percent of Service Center Employees Who Are Black	*Percent of Office Employees Who Are Black*
1975	26	8
1974	26	9
1973	26	10
1972	25	9
1971	25	8
1970	24	8
1969	22	8
1968	21	10
1967	17	4
1966	11	5
1965	6	1

99. The following statistics show the number of whites and blacks hired into office jobs in each year from 1965 through 1974. (Exhibit P-212):

	Whites	*Blacks*
1974	2	0
1973	6	0
1972	16	2
1971	15	1
1970	36	3
1969	45	4
1968	42	4
1967	19	0
1966	36	5
1965	8	0
Total	225	19

100. The foregoing statistics show that, since 1965, the number of blacks in office jobs has been disproportionately low, and that only 19 of 244 persons hired into the office (or 7.8%) have been black. Defendant offered no evidence to explain these statistical disparities.

101. Defendant offered no evidence of any formal program by which employees or potential employees learn of vacancies in the office. Betty J. Davidson, Defendant's Personnel Section Chief, testified that employees learn of vacancies in the office "by word of mouth." (Exhibit P-262, Davidson Dep., pp. 106-107).

102. Plaintiff Marable testified that, when she first applied for employment with Defendant, she requested (both orally and on the application form) a job as a clerk-typist in the office. (Marable, II-18). In response to her request, Plaintiff Marable was told that there "wasn't any opening" in the office and that she "could work her way up through [the] shop." (Marable, II-18). However, a white female applicant was hired at the same time for an opening in the office. (Marable, II-19). Plaintiff Marable has not been informed of any of the vacancies in the office which have occurred during her employment with Defendant. (Marable, II-23). Although she filled out an application form requesting a transfer to the office, she never received a response, and was never transferred. (Marable, II-24).

104. The following statistics show the number and percent of blacks and whites available for promotion from hourly-rated to salaried jobs, and the number and percent

actually promoted from hourly-rated to salaried jobs, from 1965 through 1973. (Exhibit P-239):

	Number in Hourly Jobs	*Percent of Those in Hourly Jobs*	*Number Promoted to Salaried Jobs*	*Percent of Those Promoted to Salaried Jobs*
1973				
Blacks	227	31.6	0	0.0
Whites	492	68.4	3	100.0
1972				
Blacks	246	30.9	1	25.0
Whites	549	69.1	3	75.0
1971				
Blacks	247	29.1	0	0.0
Whites	601	70.9	13	100.0
1970				
Blacks	252	28.3	1	7.1
Whites	637	71.7	13	92.9
1969				
Blacks	244	29.6	3	14.3
Whites	579	70.4	13	85.7
1968				
Blacks	220	27.6	4	21.1
Whites	577	72.4	15	78.9
1967				
Blacks	188	26.1	1	8.3
Whites	533	73.9	11	91.7
1966				
Blacks	139	20.0	3	8.3
Whites	555	80.0	33	91.7
1965				
Blacks	62	10.0	0	0.0
Whites	555	90.0	11	100.0
Total 1965-73				
Blacks	203 (avg.)	26.4	13	9.8
Whites	504 (avg.)	73.6	120	90.2

105. These statistics show that, from 1965 through 1973:

a. Only 13 blacks, as compared to 120 whites, were promoted from hourly-rated to salaried jobs;

b. While blacks constituted 26.4% of those available for promotion, only 9.8% of those promoted were black;

c. While whites constituted 73.6% of those available for promotion, 90.2% of those promoted were white. (Exhibit P-239).

107. The following statistics show the number and percent of females and males available for promotion from hourly-rated to salaried jobs, and the number and percent actually promoted from hourly-rated to salaried jobs, from 1965 through 1973. (Exhibit P-240):

[See table, page 70a]

	Number in Hourly Jobs	*Percent of Those in Hourly Jobs*	*Number Promoted to Salaried Jobs*	*Percent of Those Promoted to Salaried Jobs*
1973				
Females	161	22.4	1	33.3
Males	558	77.6	2	66.7
1972				
Females	168	21.1	1	25.0
Males	627	78.9	3	75.0
1971				
Females	178	21.0	2	15.4
Males	670	79.0	11	84.6
1970				
Females	179	20.1	0	0.0
Males	710	79.9	14	100.0
1969				
Females	146	17.7	1	4.8
Males	677	82.3	20	95.2
1968				
Females	123	15.4	0	0.0
Males	674	84.6	19	100.0
1967				
Females	116	16.1	2	15.4
Males	605	83.9	11	84.6
1966				
Females	142	20.5	9	25.0
Males	552	79.5	27	75.0
1965				
Females	85	13.8	0	0.0
Males	532	86.2	11	100.0
Total 1965-1973				
Females	144 (avg.)	18.8	16	11.9
Males	623 (avg.)	81.2	118	88.1

108. These statistics show that, from 1965 through 1973:

a. Only 16 females, as compared to 118 males, were promoted from hourly-rated to salaried jobs;

b. While females constituted 18.8% of those available for promotion, only 11.9% of those promoted were female. (Exhibit P-240).

111. The section chief's recommendation is the indispensable single most important factor in the promotion process. Before an hourly-rated employee is considered for promotion to a salaried position, the employee's section chief (*i.e.*, foreman) must first recommend the employee for the promotion. (Joint Stipulation 123). This recommendation must be made by the employee's section chief in writing on Defendant's Form WF-144, entitled "Recommendations for Salaried Positions" (Exhibit P-18, Joint Stipulation 123). Only the employee's section chief can originate this recommendation form; the employee is not permitted to apply for promotion or recommend himself or herself for promotion. (Joint Stipulation 126; Exhibit P-261, Barr Dep., pp. 30-31). Not even a department chief or assistant manager can initiate this promotion process. (*Id.*)

112. Section chiefs are given no written instructions pertaining to the qualifications necessary for promotion; they are given nothing in writing telling them what qualities to look for in making this recommendation. During their depositions, Defendant's section chiefs testified that they received neither written instructions, nor written materials of any sort, telling them what qualities to look for in recommending hourly-rated employees for promotion to salaried positions. (Exhibit P-251, Alsop Dep., p. 117; Exhibit P-259, Rowe Dep., p. 275). At trial, Ralph P. Wooten, Manager of the service center, confirmed that there are no written instructions setting forth the qualifications that are necessary, or the criteria that are to be used, in promoting

hourly-rated employees to salaried positions. (Wooten, II-64).

113. The standards for promotion, which are, in practice, applied by section chiefs, are vague and subjective. Joint Stipulation 124 provides: "Each section chief uses his or her own judgment in recommending hourly-rated employees for promotion to salaried positions in the office." The deposition testimony of Defendant's section chiefs firmly establishes that, in relying on their own judgment, they applied extremely vague and subjective standards. In particular, Defendant's section chiefs attempted to assess such qualities as "attitude," "initiative," "overall outlook on work," and "need for supervision." These section chiefs testified that they recommended a particular person or persons for promotion to a salaried position for the following reasons:

> *Joseph E. Raley, section chief in the shop*: "Because I thought they were outstanding people." (Exhibit P-257, p. 73).
>
> *William K. Stanley, section chief in the shop*: "He was doing above average job for me in the hand set department [and] I think he was capable of doing clerical type work." (Exhibit P-258, pp. 60-61).
>
> *Harold D. Alsop, Jr., section chief in the warehouse*: "[He was a] better than average worker, willing to do anything. . . . Always a willingness to be doing something—good attendance and an overall good outlook on work." (Exhibit P-251, p. 119).
>
> *Cecil J. Rowe, Jr., section chief in the shop*: "As I can recall, he had a positive attitude, required a minimum amount of supervision, and had a good sense of closure." (Exhibit P-259, p. 271).

• • •

> "As best I can recall, [he] did an outstanding job, showed a lot of initiative, required very little supervision, accepted responsibility." (Exhibit P-259, p. 276).

114. The indispensable, initial recommendation for consideration for promotion to a salaried job "is a subjective determination that is made by the individual section chiefs. It is a determination that is made without objective guidelines for the jobs that might be available. This type of situation is completely subjective. It [the determination] is typically made by white males, and it is open to the same types of potential abuses of subjective judgments which disparately impact upon blacks[']and females['] [hiring] opportunities." (Haimes, I-44).

117. Defendant's failure to inform hourly-rated employees about the promotion process indicates "a closed system of promotion where the individual section chiefs, the supervisors, can exercise their discretion as they deem appropriate without concern for review or control and without any [input] allowed by employees to indicate their willingness and interest for promotion." (Haimes, I-44-45).

118. There are no safeguards in the promotion procedure designed to avert discriminatory practices. Only a section chief can decide that one of the hourly-rated employees in his section should be promoted to a salaried job. (Joint Stipulations 123, 12[illegible]).

119. An independent factor that is considered in determining whether certain hourly-rated employees should be promoted to salaried positions is whether the employee achieved a passing score on Defendant's "Clerical Test Battery" if the employee took the battery at the time of initial employment. (Joint Stipulation 125).

121. Defendant has not attempted to conduct any test validity studies to determine whether the "Clerical Test

Battery" is valid for use in selecting hourly-rated employees for promotion to nonentry-level salaried positions in the service center office. (Kirkpatrick, I-151-152).

154. The following statistics show the number of supervisors in Defendant's installation organization, and the number of black and female supervisors, in each year from 1965 through 1975. (Exhibit P-245):

	Total Number	*Blacks*	*Females*
1975	49	0	0
1974	57	0	0
1973	76	1	0
1972	76	0	0
1971	93	0	0
1970	92	0	0
1969	92	0	0
1968	99	0	0
1967	99	0	0
1966	98	0	0
1965	98	0	0

155. Since July 2, 1965, 36 persons have been promoted from nonsupervisory to supervisory positions in the installation organization, only one of whom was black. (P-246). The one black was Milton A. Delaney, Jr., who held a supervisory position from April 1973 until November 1974, when he was demoted to an hourly-rated employee. (Joint Stipulation 157; Delaney, I-224, 229).

156. The following statistics show the number of supervisors, in Defendant's service center, and the number of black male, white female, and black female supervisors, in each year from 1965 through 1975. (Exhibit P-242):

	Total Number	*Black Males*	*Percent*	*White Females*	*Percent*	*Black Females*	*Percent*
1975	64	3	4.7	2	3.1	0	0.0
1974	70	3	4.3	3	4.3	0	0.0
1973	78	4	5.1	4	5.1	0	0.0
1972	83	4	4.8	3	3.6	0	0.0
1971	84	3	3.6	2	2.4	0	0.0
1970	93	3	3.2	2	2.2	0	0.0
1969	88	3	3.4	2	2.3	0	0.0
1968	77	1	1.3	0	0.0	0	0.0
1967	70	1	1.4	1	1.4	0	0.0
1966	71	0	0.0	1	1.4	0	0.0
1965	63	0	0.0	3	4.8	0	0.0

157. Between 1968 and 1975, the percentage of blacks in the work force of the service center varied from 21% to 26% and the percentage of females in the work force varied from 22% to 27%. (Exhibit D-12A). During this period of time, however, the percentage of black supervisors varied only from 1.3% to 5.1%, and the percentage of female supervisors from 0.0% to 5.1%. (Exhibit P-242).

158. Of the 56 persons promoted from nonsupervisory to supervisory positions in the service center since July 2, 1965, only five (or 8.9%) have been black and only three (or 5.4%) have been female. (Exhibit P-243).

159. The foregoing statistics clearly demonstrate that Defendant's practices with respect to selection of supervisory personnel have had an adverse impact on blacks and females. (Haimes, I-42).

161. Since 1960, three persons without prior experience as installers were appointed to the position of section chief in the installation organization; all were white males. (Joint Stipulation 155). In 1973, J.C. Townsend, a white female, was promoted by Defendant to the position of installation supervisor in the Maryland installation organization, having had no prior experience as an installer. (Joint

Stipulation 156). Defendant has offered no evidence that a minimum number of years experience as an installer is necessary to become an installation supervisor.

162. There has been a large pool of black and female service center employees with substantial on-the-job experience since at least 1965: in July 1965, there were 67 females and 27 blacks with five or more years of experience; by July 1971, there were 100 females and 64 blacks with five or more years of experience. (Exhibit D-12A).

163. The entire process whereby supervisory positions are filled is "informal." (King II-144). To be considered for promotion to a supervisory position, an installer must first be recommended by his job supervisor. (King, II-142-43). However, there are no written or oral guidelines setting forth the criteria that the job supervisor should use in recommending the installer; and there are no written guidelines setting forth the criteria to be used in promoting an installer to a supervisory position. (King, II-144; Exhibit P-256, Hill Dep., pp. 78-79; Exhibit P-252, Mamola Dep., pp. 29-30; Exhibit P-263, King Dep., pp. 37-38). Promotional decisions are made on the basis of informal consultation among existing supervisors concerning installers who show "potential." (Exhibit P-263, King Dep., p. 35).

164. Defendant's supervisory personnel testified that: in practice, advancement to a supervisory position in the installation organization depends on the opportunity to obtain "in charge" duties involving temporary assignment to work operations with supervisory responsibilities; there are no guidelines as to when an installer may be given an "in charge" assignment; and such assignments depend entirely upon unreviewable and subjective determinations by the all-white supervisory staff. (King, II-143; Riddell, II-173; Delaney, I-233; Exhibit P-254, Galey Dep., p. 42).

165. There is a clearly defined line of progression to supervisory positions in the service center involving promotion from an hourly-rated position to a salaried position in the office, and from there to the supervisory staff. (Haimes, I-47; Wooten, II-56-57). Of the 50 current section chiefs in the service center, 49 were promoted directly from salaried positions in the office; of these, 46 began their employment with Defendant as hourly-rated employees and were promoted to salaried positions in the office before being promoted to the position of section chief. (Exhibit P-241).

166. The pool of blacks and females available for promotion to the position of section chief (*i.e.*, those in salaried positions in the office) is disproportionately low due to the disproportionately low rate of promotion of black and female hourly-rated employees to salaried jobs in the office. (Haimes, I-47; see Findings 104-121).

167. Vacancies in supervisory positions are not posted, announced, or generally publicized. (Joint Stipulations 140, 153). Nonsupervisory employees do not have to apply for or express an interest in a supervisory position to be considered. (Joint Stipulations 140, 153). Employees are not informed as a practice that they are under consideration for a supervisory position. (Joint Stipulations 139, 152; King, II-145; Delaney, I-225).

169. Based on the foregoing, the process by which Defendant selects supervisory personnel is subjective and uncontrolled, and is responsible for the adverse impact on blacks and females set forth in Findings 154-162.

170. Other than the appointment of Mr. Delaney, there have been no affirmative efforts to recruit, hire or promote blacks or females into supervisory positions in the installation organization. (King, II-146).

171. According to the current goals and timetables of the service center, set forth in its 1975 Affirmative Action Plan, the percentage of blacks and females holding supervisory positions is not expected to reach 4% and 10%, re-

spectively, until at least 1995, assuming that "business picks up." (Davidson, II-85; Exhibit P-67). This percentage compares with the fact that 44% of the labor supply available for Defendant's supervisory positions is black, and 41% is female. (Haber, I-94).

172. Defendant has made no demonstration of affirmative action to recruit, hire or promote black or female supervisors.

Defendant's Proposed Findings of Fact Adopted by the Court

41. Plaintiffs Hill, Ward and Merriwether presented no evidence to support their allegations of race discrimination, and, indeed, the record refutes their individual claims. All three were hired for the position for which they had applied (Stip. Nos. 187, 196, 205). All three advanced at rates comparable to others with comparable start dates: some blacks and some whites advanced faster than these plaintiffs, and some blacks and some whites advanced more slowly (Stip. Nos. 189, 198, 207; Exhibit D-43B). All three were laid off pursuant to the last hired-first fired principle (Stip. No. 166), and they have not alleged that they sought employment with the defendant at any time prior to their successful applications, let alone that they were denied employment because of their race.

42. Plaintiff Carter presented no evidence to support her allegations of race and sex discrimination, and her individual claim is also refuted by the record. She was hired at the time of her initial application (Stip. Nos. 233, 235). She has advanced at the same rate as those with comparable start dates, and is still employed by the Washington Service Center (Stip. No. 236; Exhibit D-12D).

45. There is no evidence in the record to support the allegations that the defendant has discriminated on the basis of race and sex in providing training school opportunities.

46. There is no evidence in the record to support the allegations that the defendant has discriminated on the basis of race in providing sickness benefits.

47. There is no evidence in the record to support the allegations that the defendant has arbitrarily transferred or in any manner harassed or intimidated employees who pursue their rights under Title VII.

67. All entry level, hourly-rated jobs in the Washington Service Center are designated as Grade 1. The remaining hourly grades in the Washington Service Center are Grade 2, Grade 3, Grade 4 and Grade 5. Each of these respective grades requires a higher level of skill and carries with it a higher rate of pay. There is a detailed, written job description for each hourly-rated job (Stip. No. 11; Tr. Wooten, at II 53; Exhibits D-4A through D-4D).

68. Upgrading in hourly positions in the Washington Service Center is controlled by union contract, which provides, in effect, that all upgrades will be determined by seniority within occupational groups unless a person is determined by the company to be unqualified (Stip. No. 89; Tr. Bowden, at III 113). A determination by the Washington Service Center that a person is unqualified is subject to the grievance and arbitration procedures established by the union contract (Stip. No. 91).

69. Upgrading through Grade 3 in the shop trades and warehouse occupational groups does not depend on vacancies in the grade. As a practical matter, upgrading to Grade 2 within the shop trades and warehouse occupational groups has been automatic when the employee has been at the top rate of Grade 1 for 6 months. Similarly, upgrading to Grade 3 within the shop trades and warehouse, as a practical matter, has been automatic at the end of 60 months of service. Upgrading to grade 4 within the shop trades and warehouse occupational groups occurs only when there is a vacancy (Stip. Nos. 95, 98, 99, 101; Exhibits D-4B, D-4C).

70. Upgrading in the shop non-trades and house service occupational groups occurs only when a vacancy is created by the need to replace an employee who has been terminated, transferred, upgraded, or downgraded for cause (Stip. Nos. 103, 104).

71. The relative rates of advancement in the various occupational groups are a function of business trends and conditions. While in recent years shop trades and warehouse employees have advanced to grade 3 more quickly than have shop non-trades employees (Exhibit P-234), in the mid-1960's advancement was more rapid in shop non-trades positions (Tr. Bowden, at II 109).

73. The statistical evidence shows that whites and blacks, and males and females, of comparable seniority have advanced at equal rates (Exhibits D-12C, pp. 1-10; Exhibit D-12D, pp. 1-10; Exhibit D-12F, pp. 1-9).

74. Based upon the foregoing, the Court finds that the upgrading policies of the Washington Service Center have not had an adverse impact on blacks or women.

89. The compensation, terms and conditions of employment of hourly workers in Installation, Washington District, are governed by a collective bargaining agreement by and between the Western Electric Company, Incorporated, and the Communications Workers of America, effective August 14, 1974. This agreement, or a predecessor collective bargaining agreement between the same parties, has applied for the entire period covered by this litigation (Stip. No. 109; Exhibit D-39I).

90. The collective bargaining agreement recognizes that the hourly wages of installers are dependent, in part, on the skill category, called an "index" to which the installer is assigned by defendant. There are five index levels numbered from 1 to 5. The installers' wage structure, as set forth in the agreement, includes a wage schedule for each

index and provides for higher wage treatment as the employee progresses to a higher index (Stip. No. 18; Exhibit D-39I).

91. The process by which installers are upgraded is carefully developed, involves participation by several levels of supervision, and is based on written criteria and procedures.

92. Pursuant to the collective bargaining agreement, defendant has formulated and published an Index Plan (Stip. No. 112; Exhibit D-59). Extensive effort has gone into the development and periodic revision of the Index Plan (Tr. Riddell, at II 151-157).

93. The defendant has also published for the use of all supervisors a "Supervisor's Labor Relations Guide," which explains the operation of the Index Plan and gives detailed guidance to supervisors in its administration (Tr. Sprink, at II 184; Exhibit D-61).

94. Under the Index Plan, an installer is assigned to one of five indexes on the basis of his level of skill. Newly hired installers are assigned to Index 1 and can be reassigned to successively higher indexes as they acquire the skills to meet the requirements of the Index Plan (Exhibits D-59, D-61).

95. Under the Index Plan, installation work is divided into various work operations, each of which is assigned a code number within one of the indexes. Any installer may be required to perform duties included in any index level (Stip. No. 112; Tr. Riddell, at II 157; Exhibits D-59, D-61).

96. Under the Index Plan, an installer must be qualified in the work operation codes required for a particular index before being upgraded to that index. In general, qualification in a particular work operation code depends on the installer's demonstrated ability to perform that work operation at expected levels of quality, production and skill. In addition, the Index Plan requires the installer to perform

certain work operations at the Index 2 and 3 levels for prescribed minimum numbers of hours (Stip. Nos. 113-117; Exhibits D-59, D-61). The requirements for advancement are set forth in the Index Plan in detail and with precision (Tr. Riddell, at II 159-165; Exhibits D-59, D-61). The specific requirements for advancement to each higher index are as follows:

a. To be upgraded to Index 2, an installer must be qualified in three work operations: Code 200, "Assemble, Erect, Align and Mount;" Code 201, "Cabling;" and Code 202, "Basic Wiring." These work operations are described in detail in the Index Plan. In addition, the Index Plan requires that proficiency in Index 2 work operations includes the ability to perform under *specific,* detailed, oral or written directions, and using simple information sources (Stip. No. 114; Exhibits D-59, D-61).

b. To be upgraded to Index 3, an installer must be qualified in two additional work operations: Code 300, "Complex Wiring;" and either Code 301, "Basic Test;" or Code 302, "Clerical and Service." These work operations are described in detail in the Index Plan. Work Operation Code 301 requires a minimum number of hours, but the others do not. In addition, the Index Plan requires the installer to have the ability to perform Index 3 work operations under *general* directions, that is, with required supervision usually limited to a systematic check of results and an occasional check of procedure, but with supervision available if necessary. An installer who consistently needs more than general direction will not be qualified in the code, the Index Plan states. Finally, to show proficiency in Index 3 work operations, the installer must have the ability to interpret and associate information using somewhat complex information hand books, specifications and drawings (Stip. No. 115; Exhibits D-59, D-61).

c. To be upgraded to Index 4, an installer must be qualified in Code 301 (if the installer has not previously qualified

in that code) and in any one of a number of sets of specified codes associated with particular equipment or product system or systems. The systems and specified sets of codes for each are set forth in the Index Plan. To be an Index 4, the installer must demonstrate ability to perform circuit tests and clear trouble encountered, using complex information sources under minimum directions and while exercising independent action (Stip. No. 116; Exhibits D-59, D-61).

d. An Index 5 installer is a "systems tester." To be upgraded to Index 5, an installer must demonstrate ability to perform under minimum directions with a high degree of individual initiative and technical skill, to exercise independent action on procedures which are broad in scope and to analyze and associate information from all sources as required. The installer must be qualified in Code 519, "Analyze, Plan and Lay Out," and any one of 14 other codes (Stip. No. 117; Exhibits D-59, D-61).

97. The collective bargaining agreement provides that index reviews of the approved index of each installer will be conducted and that reassignment to a higher index (called "upgrading"), if approved, will be made prior to specified dates, which are at approximately six-month intervals. The agreement also sets forth a procedure for presenting grievances involving assignment or reassignment of approved indexes (Stip. Nos. 110, 111; Exhibit D-39I).

98. Each installer enters the number of hours that he performs each work operation on a weekly time ticket. These "time charges" are transferred to a computer tape and summarized, by work operation code, for each installer. The computer then prints out all the information for each installer on a form which shows separately the time charged to each code during the period to be considered in the current index review (Stip. No. 119).

99. Index reviews of all installers are conducted as prescribed in the collective bargaining agreement. Although

the exact procedure used may vary slightly, most index reviews are begun by a conference between the various supervisors and the department chief. The department chief has access to the computerized information referred to above for each installer, which shows the number of hours worked by each installer in each work operation code during a prescribed six-month period. If an installer has worked at all in a work operation code, the computer automatically gives the installer a "code rating" of 8 in that code, which signifies that the installer has worked on the work operation but is not qualified. At each index review, the supervisors, in conference, go through the complete list of installers and determine whether installers who have code ratings of 8 have qualified in that particular work operation in accordance with the requirements of the Index Plan during the prescribed six-month period. A collective judgment is made by all supervisors for whom the installer has worked during the prescribed six-month period with respect to each work operation. All recommended qualifications for work operation codes and all recommended index upgradings are then reviewed in a conference between the department chiefs and the District Manager (Stip. Nos. 120, 121; Tr. Riddell, at II 161-165; Exhibits D-59, D-61).

100. To effect a qualification in a particular work operation code or a reassignment from one index to another (upgrade), a supervisor must complete a form SD-4-1421-3, Record of Supervisor Recommendations, for each installer affected. This form requires the immediate supervisor's and department chief's approval, requires the supervisor to provide for review purposes a brief history of the installer's work assignments during the period under review, gives the supervisor an immediate reference to proficiency requirements, including work directions required at each index level, identifies the code and work operation being considered, and provides a record of the supervisors' signatures certifying proficiency requirements (Tr. Riddell, at II 165, 166; Exhibit D-62).

101. The Index Plan provides that an installer, to be qualified in any work operation code, shall have demonstrated his ability to do the work operation for the cumulative period necessary to assure continued proficiency (Average or Better Safety, Quality and Production), and must have previously qualified in the next lower index (Exhibit D-59).

102. An installer receives a code rating of 9 when the installer is found qualified in that work operation code. When an installer receives a code rating of 9 in all of the work operation codes required for the next higher index, the installer is reassigned to that higher index ("upgraded"). The changes in work operation qualifications and index upgradings, as approved by the supervisors, department chiefs and District Manager, are then submitted to the Area Manager. If approved, the changes are submitted to the Regional Index Coordinator who processes these in accordance with published corporate instructions and publishes the results. The upgrading is effective on the date prescribed in the union contract (*Id.*).

103. Of the 273 blacks hired as installers since July, 1965, a greater percentage has advanced to each higher index than is the case with the 1104 comparable whites. The exact numbers and percentages are as follows:

	Whites		*Blacks*	
Beginning Employment	1104		273	
	Number	%	*Number*	%
Advancing to Index 2 (or higher)	185	16.7%	117	42.9%
Advancing to Index 3 (or higher)	110	10.0%	74	27.1%
Advancing to Index 4 (or higher)	53	4.8%	19	7.0%
Advancing to Index 5	14	1.3%	4	1.5%

(Exhibit D-43B, pp. 1-7). Of those persons hired as installers since July, 1965, therefore, blacks have constituted 39% (117 of 302) of those persons achieving Index 2, 40% (74 of 184) of those achieving Index 3, 26% (19 of 72) of those achieving Index 4, and 22% (4 of 18) of those achieving Index 5.

104. In addition, individual black installers hired since July, 1965, have advanced equally with whites with comparable service in terms of salary and advancement to higher indexes (Exhibit D-43B).

106. Based upon the foregoing, the Court finds that blacks hired as installers by Installation, Washington District have progressed as well as, or better than, their white counterparts.

107. The requirements that an installer be qualified to perform the work associated with a higher index before being advanced to that index and that an installer advance sequentially through the indexes are essential to the safe and efficient operation of Installation, Washington District (Stip. No. 113). The sophisticated electronic work performed by installers provides vital telecommunications to the public at large and to business and governmental entities; even a minor error by an installer could cause a substantial interruption in these services (Tr. King, at 127-130; Tr. Riddell, at 160).

170. The layoff of hourly rated employees at the Washington Service Center is governed by the collective bargaining agreement, which provides that employees having less than six months' service shall be laid off first. The agreement further provides that if employees having more than six months' service are to be laid off, seniority shall ordinarily be the governing factor (Stip. No. 167; Exhibit D-6A).

171. The layoffs by the Washington Service Center have not adversely affected its black or female employees. Layoffs occurred in 1971 and 1974. In 1971, 25 employees were laid off; none was black and only one was a woman. In 1974, six employees were laid off; none was a woman and only one was black (Stip. No. 170).

172. The collective bargaining agreement provides that installers shall be laid off in inverse order of seniority, except that, if layoffs extend to installers with more than four years of service, as many as 10% of these may be exempted from layoff. The 10% exemption is applied on an Area, rather than District basis. Installers exempted in one layoff cannot be exempted a second time and are first to be laid off in a subsequent layoff (Stip. No. 159; Exhibit D-39I).

173. Between 1971 and 1975, 288 installers were laid off, of whom 108 were black (Stip. No. 161). None of those laid off were denied employment because of their race at any time prior to their successful applications. The layoffs have occurred in the inverse order of employment seniority, with the exception of individuals retained pursuant to the 10% exemption provision in the collective bargaining agreement.

174. The application of the 10% exemption has not adversely affected the black employees of Installation, Washington District. Between 1971 and 1975, 18 persons employed by Installation, Washington District, have been retained under this provision, of whom 7, or 39%, were black (Stip. No. 166). Thus, the black percentage of persons retained pursuant to the 10% exemption has exceeded the black percentage in the layoff group.

NOTE: No finding is made with reference to the defendant's affirmative action efforts to hire blacks because, although the evidence supports a finding that there were such, the evidence is far from persuasive that such efforts resulted in employment of blacks who were retained for any length of time.

DECREE AS AMENDED BY ORDER OF NOVEMBER 2, 1976

[This document, prepared for the convenience of this Court, reflects the amendments made by the November 2, 1976 Order to the October 21, 1976 Decree.]

Decree

This case was tried on the issue of liability on February 17-19, 1976, by the Court, sitting without a jury. A Memorandum Order was filed on April 30, 1976, in which the Court made findings relative to defendant's liability. In accordance with the Court's determinations, it is now Adjudged, Ordered and Decreed as follows:

(1) The class of blacks and females for purposes of this Decree (hereinafter termed the class) shall consist of all blacks and females who have unsuccessfully applied since July 2, 1965, or who will hereafter apply for employment at Western Electric's facility at Arlington, Virginia (hereinafter the Arlington facility) and all blacks and females who have been, are, or will be employed at the Arlington facility at any time since July 2, 1965.[1]

(2) The defendant, Western Electric Company, Incorporated, its officers, agents, employees, servants and all persons in active concert or participation with them are hereby permanently enjoined and restrained from discriminating against members of the class in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, at the defendant's Arlington facility.

(3) All members of the class who do not elect to be excluded from the class and who identify themselves as provided in Paragraph (40) below, will be given an opportunity to advance claims for back pay and priority hiring status.

[1] The Arlington facility for purposes of this Decree encompasses the organizational elements of the former Washington Installation District, and any functional successor to that District, and the organizational elements of the Washington Service Center and any functional successor to that Center.

(4) The claims presented shall be determined by reference to a Special Master, Gregory L. Murphy, pursuant to Rule 53 of the Federal Rules of Civil Procedure, who shall conduct hearings thereon and make findings in accordance with the guidelines set forth below. Compensation shall be allowed to said Master, including expenses, as determined by the Court, and shall be paid by the defendant.

Determination of Claims

(5) The Master shall proceed to reconstruct, as far as possible, the employment history of the Arlington facility from July 2, 1965, specifically noting the entry-level positions that opened up, classified as Installation, Service Center/Shop, Service Center/Office, and Service Center/Warehouse; the promotions made in the Service Center from hourly positions to non-supervisory, salary graded positions; promotions made in the Service Center to section chief; and promotions made in the Installation District to section chief. Of these positions and promotions, the Master shall determine which were filled by blacks or females. Of the remaining positions and promotions the Master shall determine which would have been filled by class members had Western Electric not engaged in discriminatory practices. In making this determination, the Master shall consider, among such other factors as he deems relevant, the racial and sexual makeup of the applicant and personnel pools at times corresponding to the entry level and promotional vacancies. Those positions and promotions which the Master determines would have been filled by class members but for defendant's discrimination shall be termed "designated vacancies."

(6) All persons who give notice of claims within the notice period as defined in Paragraph 40 below shall be classified by the Master into the following categories:

A. Hiring

i. Unsuccessful black applicants to the Service Center;

ii. Unsuccessful black applicants to the Installation District;

iii. Unsuccessful female applicants to the Service Center.

B. Placement (Service Center)

i. Female Shop Non-Trades employees who claim that they would have preferred placement in Shop Trades at the time of their hiring;

ii. Female Shop Non-Trades employees who claim that they would have preferred placement in Warehouse at the time of their hiring;

iii. Black Shop Non-Trades employees who claim that they would have preferred placement in Shop Trades at the time of their hiring;

iv. Black Shop and Warehouse employees who claim that they would have preferred placement in Office at the time of their hiring.

C. Promotion (Service Center)

i. Hourly to non-supervisory, salary graded

1. Females claiming they should have been promoted;

2. Blacks claiming that they should have been promoted.

ii. To section chief

1. Females claiming that they should have been promoted;

2. Blacks claiming that they should have been promoted.

D. Promotion (Installation District)

i. To section chief

1. Blacks claiming that they should have been promoted.

(7) Each claimant must make out a prima facie case to the satisfaction of the Master. If the claimant is an unsuccessful applicant, he/she must demonstrate (1) that they made an application and when; and (2) that they could and would have accepted employment if offered. If the claimant is a black employee placed in Shop Non-Trades claiming that he should have been placed in Shop Trades, he must demonstrate that he would have accepted employment in Shop Trades if offered. If the claimant is a black employee placed in the Shop or Warehouse claiming that he/she should have been placed in Office, they must demonstrate that they would have accepted employment in Office if offered. If the claimant is a female employee placed in Shop Non-Trades claiming that she should have been placed in Shop Trades or Warehouse, she must demonstrate that she would have accepted employment in Shop Trades or Warehouse if offered. If the claimant asserts that he/she was denied a promotion by reason of defendant's discrimination, they must show that they were employed at the time some promotion, for which they were eligible on a non-discriminatory basis, was made, and they would have accepted such a promotion if offered.

(8) Once the Master finds that a prima facie case has been made, he shall assign a date to the claimant (hereinafter termed a "provisional claimant") signifying the earliest date on which that claimant applied and was not hired, or was hired and not placed as desired, or was not pro-

moted. That date shall be termed the "designated date" for that claimant.

(9) For each provisional hiring claimant, the Master shall review the designated entry level vacancies that occurred within one (1) year following that claimant's designated date, and shall find whether or not that claimant, but for defendant's discrimination, would have been hired.

For each provisional promotion claimant, the Master shall review the designated promotional vacancies that occurred within one (1) year following that claimant's designated date, and shall find whether or not that claimant, but for defendant's discrimination, would have been promoted.

For each provisional placement claimant, the Master shall determine whether there was a designated entry-level vacancy in a job group which the claimant would have preferred at the time of his/her hiring and to which the claimant would have been assigned but for defendant's discrimination.

(10) If the Master finds that a claimant was entitled to a position, the defendant has the burden of showing either (1) that there was no discrimination in the selection of a person to fill that position, or (2) that the claimant was not qualified (e.g., physically or with reference to job-related skills) at the time the position was filled.

(11) Each claimant who is found to have been denied a position as a consequence of defendant's discrimination, and who is not disqualified by defendant, shall be termed an eligible claimant. There may be more than one eligible claimant for a given position.

Back Pay

(12) The Master shall determine the amount of back pay to be awarded each eligible claimant. The formula below shall be used as a guideline, but the Master may take into account the eligible claimant's actual employment history and such other factors as he may deem relevant to that claimant's performance potential, and may adjust the formula figure up or down accordingly, stating the reasons for such adjustment. Job turnover in the claimant's designated vacancy category also may be a factor in adjustment of the formula figure, but turnover shall not function to limit conclusively the sum of all back pay awards.

(13) For purposes of determining back pay, the term "cutoff date" shall mean the last date upon which notice of claim may be given as established in Paragraph (40) below. The term "back pay period" for each eligible claimant shall mean the period ending on the cutoff date and commencing on either October 31, 1970, or the designated date for that claimant, whichever is shorter. The term "employee-years" shall mean the cumulative number of years, or portions thereof, during which those employees included in the finding made by the Master pursuant to Paragraph (14) below were actually in the service of defendant. The term "earnings" shall encompass all compensation paid by defendant, including but not limited to, raises, wages or salary after promotions, bonuses, and benefits.

(14) From the designated date for each eligible claimant the Master shall compute the annual earnings of the person who filled the designated vacancy to which the eligible claimant was entitled until that person left the employ of defendant. The Master shall note also the annual earnings of each person who succeeded to that position; the annual earnings of each person who filled a comparable designated vacancy from the designated date of the cutoff date and the successors of those persons, so long as they were in the employ of defendant.

(15) The Master shall total up all annual earnings figures from (14), and divide that sum by the number of employee-years included. The resulting figure is the aver-

age annual earnings for the eligible claimant. That figure, multiplied by the number of years in the back pay period of that claimant yields the gross back pay award.

(16) The Master shall determine the actual income of the eligible claimant during the back pay period. Subtracting that sum from the gross back pay award yields the net back pay award. Interest on the net back pay award shall be allowed by the Master at a rate of 6% per annum to be based on the accumulated net back pay owing the eligible claimant on December 31 of each year in the back pay period.

(17) If there is more than one eligible claimant to a given designated vacancy, net back pay award figures shall be computed for each. One award shall be made to all such claimants in an amount equal to the highest individual net award. Each such claimant shall share that award in the proportion that his/her individual net back pay award bears to the total of all claimants' net back pay awards for that particular designated vacancy.

(18) Defendant shall have the opportunity to seek reduction of the net back pay award for each eligible claimant by showing higher actual earnings, or earnings obtainable through due diligence, or demonstrable factors probative on the question of how the claimant might have performed had no discrimination occurred.

(19) Upon determination of all back pay awards, the defendant shall be given the option, as to each individual eligible claimant, either to have a lump sum future damage award determined by the Master, or to hold the issue of future damages in abeyance pending a priority promotion or hiring offer pursuant to Paragraph (20) below. In making a future damage award, the Master shall consider the claimant's earning history, employment record, increases or decreases in annual damages reflected in the determination of the claimant's back pay award, work-life

expectancy at the Service Center or Installation District as appropriate, and any other relevant factors. The amount of such award shall be discounted to present value. Satisfaction of the lump sum future damage award shall discharge entirely any and all future liability of defendant toward that claimant for its discrimination. If the defendant chooses the priority offer alternative, a determination of additional back pay shall be made coincidentally with the annual reports required by Paragraph (42) below, until such time as a priority offer is made, or until such time as the defendant chooses to have a lump sum future damages award determined. Once a priority offer is made to and accepted or refused by an eligible claimant, defendant shall be discharged entirely from any and all future liability to that claimant for its discrimination.

PRIORITY OFFERS

(20) Upon the determination of all back pay awards, the defendant shall undertake to make priority offers of promotion, transfer, and hiring to eligible claimants not disposed of under Paragraph (19) above.

A. Promotion

As vacancies occur, defendant shall make priority offers to eligible claimants in the order of their respective designated dates, beginning with the earliest. If there are multiple eligible claimants with a given designated date, they shall be offered promotion in the order of their respective seniority. Promotion shall be offered only to those eligible claimants who are employed at the time by the defendant, and who are qualified on a job-related, non-discriminatory basis.

B. Placement

As vacancies occur in Shop, Office or Warehouse, defendant shall make priority offers to eligible claimants to transfer to these openings in the order of their respective desig-

nated dates. If there are multiple eligible claimants with the same designated date, they shall be offered transfer in alphabetical order. The defendant may assign the transferring eligible claimant to an entry level position but the claimant shall retain his/her seniority and wage status.

C. Hiring

As vacancies occur in Service Center or Installation Division that are not filled by persons on layoff pursuant to recall rights in the collective bargaining agreements, defendant shall make priority offers of employment to eligible claimants in the order of their respective designated dates. If there are multiple eligible claimants with the same designated date, they shall be offered employment in the order of their qualification as determined by the Master based on non-discriminatory, job-related criteria.

D. In all priority categories, priority offers shall be made until all eligible claimants not disposed of under Paragraph (19) above have had an opportunity to accept such offers. Only one offer need be made per eligible claimant. Where multiple claimants are determined to be eligible for one designated vacancy, the acceptance of a priority offer by one such claimant does not relieve the defendant from its obligation to make priority offers to the others until all such claimants have had an opportunity to accept or reject priority offers. Acceptance of an offer by one of such multiple claimants, however, shall relieve the defendant of its continuing back pay obligation under Paragraph (19) to the others. Upon acceptance of a priority offer, an eligible claimant shall be accorded seniority as though he/she had been hired, placed, or promoted on their designated date, and shall be paid at a rate not less than the average annual earnings figure for that claimant as computed under Paragraph (15).

(21) In the case of eligible placement and promotion claimants not employed by defendant on the cutoff date,

back pay shall be limited to the time within the back pay period during which the claimants were actually in defendant's employ. Nor shall defendant be obligated to make priority transfer or promotion offers to claimants not in service at the time appropriate vacancies occur. All continuing liability on the part of defendant to eligible placement and promotion claimants shall cease upon their leaving defendant's employ.

If a claimant is found to be eligible by the Master, but subsequently is found to be unable to perform the duties of a position at the time the defendant otherwise would be required to make a priority offer of that position to that claimant, no obligation to make such an offer shall be imposed on defendant. Instead the Master shall determine the additional back pay, if any, owing the claimant up to the time he/she is found to have become unable to perform, and satisfaction of that sum shall discharge the defendant entirely from any and all future liability to that claimant for its discrimination.

Remedial Actions

(22) Defendant shall develop non-discriminatory job-related hiring and promotion criteria and selection procedures within six (6) months of the date of this Decree to be presented to the Court for its provisional approval. Such criteria and procedures shall be formulated with a view toward classifying individuals as either qualified or not qualified, and shall not be utilized to make relative qualification a controlling factor in hiring or promotion. These criteria and procedures are to be implemented after priority hiring and promotion are completed. The impact of these criteria and procedures shall be reviewed annually by the Court pursuant to Paragraph (42) below, and shall be modified, if necessary, especially if the hiring and promotion preference ratios set out below cannot be achieved consistently by use of such criteria and proce-

dures. Annual review shall cease upon termination of the Court's jurisdiction.

(23) After the priority promotion, placement, and hiring procedures of Paragraph (20) above have been completed, defendant shall undertake preferential promotion and hiring in accordance with Paragraphs (24)-(33) below to the fullest extent possible given the pool of qualified individuals established by application of the criteria and procedures approved under Paragraph (22) above.

(24) Subject to the availability of qualified blacks, the defendant shall fill all vacancies in non-supervisory, salary graded jobs at the Service Center in the ratio of at least two (2) blacks for every one (1) other employee placed in such jobs until such time as the percentage of blacks in non-supervisory, salary graded positions approximates cumulative applicant pool proportions for the previous four (4) years.

(25) Subject to the availability of qualified blacks, the defendant shall fill all vacancies in service center section chief jobs at its facility in Arlington, Virginia, in the ratio of at least two (2) blacks for every one (1) other employee placed in such jobs until such time as the percentage of blacks in service center section chief positions approximates cumulative applicant pool proportions for the previous four (4) years.

(26) Subject to the availability of qualified blacks, the defendant shall fill all vacancies in installation section chief jobs at its facility in Arlington, Virginia, in the ratio of at least two (2) blacks for every one (1) other employee placed in such jobs until such time as the percentage of blacks in installation section chief positions approximates cumulative applicant pool proportions for the previous four (4) years.

(27) Subject to the availability of qualified females, the defendant shall fill all vacancies in non-supervisory, salary graded jobs at the Service Center in the ratio of at least three (3) females for every two (2) males placed in such jobs until such time as the percentage of females in non-supervisory, salary graded positions approximates cumulative applicant pool proportions for the previous four (4) years.

(28) Subject to the availability of qualified females, the defendant shall fill all vacancies in service center section chief jobs at its facility in Arlington, Virginia, in the ratio of at least three (3) females for every two (2) males placed in such jobs until such time as the percentage of females in service center chief positions approximates cumulative applicant pool proportions for the previous four (4) years.

(29) Subject to the availability of qualified females, the defendant shall fill all vacancies in installation section chief jobs at its facility in Arlington, Virginia, in the ratio of at least one (1) female to every two (2) males placed in such jobs until such time as the number of female installation section chief personnel approximates twenty-two (22) percent of the total installation section chief personnel.

(30) Subject to the availability of qualified black applicants, the defendant shall fill all vacancies in entry-level hourly-rated service center jobs at its facility in Arlington, Virginia, in the ratio of at least two (2) blacks for every one (1) other employee hired for such vacancies until such time as the percentage of blacks in hourly rated service center positions approximates cumulative applicant pool proportions for the previous four (4) years.

(31) Subject to the availability of qualified black applicants, the defendant shall fill all vacancies in entry-level, hourly-rated installation jobs at its facility in Arlington, Virginia, in the ratio of at least two (2) blacks for every one (1) other employee hired for such vacancies until such time as the percentage of blacks in hourly-rated installation positions approximates cumulative applicant pool proportions for the previous four (4) years.

(32) Subject to the availability of qualified female applicants, the defendant shall fill all vacancies in entry-level, hourly-rated service center jobs at its facility in Arlington, Virginia, in the ratio of at least three (3) females for every two (2) male employees hired for such vacancies until such time as the percentage of females in hourly-rated service center positions approximates cumulative applicant pool proportions for the previous four (4) years.

(33) Subject to the availability of qualified female applicants, the defendant shall fill all vacancies in entry-level hourly-rated installation jobs at its facility in Arlington, Virginia, in the ratio of at least one (1) female for every two (2) male employees hired until such time as the number of female hourly-rated installation personnel approximates twenty-two (22) percent of the total hourly-rated installation personnel.

(34) Descriptions of all entry-level positions in the Service Center, including positions in the Warehouse, the Shop (Nontrades and Trades), and the Office, shall be made available to applicants for employment at the Service Center. Applicants shall be informed that such descriptions (a) are for informational purposes only, (b) are not intended to indicate all of the duties to be performed, and (c) will be used for no other purpose than to inform applicants of the general nature of such jobs. A description of the basis and qualifications for advancement from Grades 1 through 5 in these occupational groups, and M-10 through M-50 in the Office, shall also be made available.

(35) If an applicant for employment at the Service Center applies at a time when there are vacancies in more than one group of entry-level positions, he or she shall be permitted to state in writing the groups of positions, if any, that he or she prefers in the order of preference. To the extent that existing vacancies permit, applicants who

are hired shall be assigned to the position of their highest preference for which they are qualified.

(36) At least once every year, the defendant shall notify high schools, vocational schools, technical schools, and state and local employment agencies within the Washington Metropolitan Area that it maintains a non-discriminatory hiring policy and will consider applicants for employment without regard to race or sex.

(37) Before hiring persons for employment in the Installer position at Installation, the defendant shall take the following actions to encourage women to apply for such position:

A. All media advertisements shall specify that the job is open to men and women;

B. Recruiting literature, such as posters and handouts, shall be designed specifically to encourage women to apply for the Installer position;

C. The defendant shall notify organizations in the Washington Metropolitan Area specializing in disseminating information on employment opportunities for women of its desire to obtain women applicants for the Installer position.

NOTICE

(38) Within forty (40) days of the date of this Decree the defendant, at its expense, shall undertake to give notice of the action to class members by the following means:

A. Certified mail to the last known address of each class member known or made known to defendant;

B. Notice posted on all bulletin boards generally used for communication with employees at the Arlington facility;

C. Notice published at least twice weekly for four consecutive weeks in every daily newspaper of general circu-

lation published within a twenty-five (25) mile radius of the Arlington facility, such notice to be placed as directed by plaintiffs' counsel.

D. Notice published each week for four consecutive weeks in every weekly newspaper of general circulation published within a twenty-five (25) mile radius of the Arlington facility, such notice to be placed as directed by plaintiffs' counsel.

E. Radio "spot" announcements by no more than three (3) stations to be selected by plaintiff at such times as plaintiff choses, at a total cost not to exceed two thousand dollars ($2,000.00), the last broadcast to take place not later than the last published newspaper notice.

(39) Plaintiffs, at their own expense, may undertake any additional means of notifying class members, the contents of such notice to be as determined pursuant to Paragraph (40) below.

(40) Within ten (10) days of the date of this Decree, the parties, by counsel, shall agree upon the form and content of the notice to be given class members pursuant to Paragraphs (38) and (39) above. The selection of the print and broadcast media, and the placement of such notice by them also shall be agreed upon. Notice shall provide that all class members who desire to advance claims must notify the Master within ten (10) days of the last publication of notice under Paragraph (38) above. After the expiration of that period, no further claimants shall be recognized. Notice on the part of any class member to be excluded from the class also must be given within this period. Any dispute concerning the form or substance of the notice, or the manner of its publication, or the reasonableness of any of plaintiffs' directions pertaining thereto, shall be presented to the Court for its resolution within the ten-day period of this paragraph.

REPORTS

(41) The defendant is ordered to maintain appropriate records of all actions taken pursuant to this Decree and to allow counsel for plaintiffs to inspect these records at any time upon fifteen (15) days' notice.

(42) Until further order of the Court, the defendant is ordered to make annual reports to the Court, the first report being due on January 31, 1977. Each report shall contain:

A. A list of all persons who applied for employment at the defendant's facility in Arlington, Virginia; the list must include the name, race, sex and date of application for each applicant, and, if hired, the date of hire and the reasons for hire; for applicants not hired, the list must specify the reasons why each such applicant was not hired;

B. A list of all vacancies in Shop, Warehouse, and Office jobs at the defendant's facility in Arlington, Virginia; the list must include all persons placed in Shop, Warehouse and Office jobs, setting forth name, race, sex, date of application, date placed and reasons placed; the list must also include all persons who expressed an interest in being placed in Shop, Warehouse or Office jobs but were not so placed, setting forth name, race, sex, date of denial of placement, and reasons for denial of placement;

C. A list of all vacancies in non-supervisory, salary graded positions at the defendant's facility in Arlington, Virginia; the list must include all persons placed in non-supervisory, salary graded positions, setting forth name, race, sex, date of application, date placed, and reasons placed; the list must also include all persons who expressed an interest in being placed in non-supervisory, salary graded positions but were not so placed, setting forth name, race, sex, date of denial of placement and reasons for denial of placement;

D. A list of all vacancies in supervisory positions at the defendant's facility in Arlington, Virginia; the list must include all persons placed in supervisory positions, setting forth name, race, sex, date of application, date placed and reasons placed; the list must also include all persons who expressed an interest in being placed in a supervisory position but were not so placed, setting forth name, race, sex, date of denial of placement and reasons for denial of placement.

(43) Such reports shall be submitted until January 31, 1980, at which time the Court shall enter an order divesting itself of jurisdiction over this matter unless, prior to that date, on application of any party, jurisdiction is extended.

COSTS

(44) The plaintiffs shall be and are hereby awarded their costs in this action, including their expenses and reasonable attorneys' fees in an amount to be determined by this Court. Within ten (10) days of the entry of this Decree, counsel for the plaintiffs are directed to file with the Court an application setting forth an itemization through the date hereof of the time for which attorneys' fees are claimed, an itemization of costs and expenses through the date hereof, and such other information as may be appropriate. The defendant shall have fifteen (15) days thereafter to file a statement with the Court, if defendant so wishes. Plaintiffs shall also be entitled to reasonable attorneys' fees and expenses in connection with carrying out the provisions of this Decree upon application therefor to this Court from time to time over the period during which this Decree shall remain in effect.

EXTENSIONS OF TIME

(45) The time specified in this Decree for the performance of any act may be extended upon application to the Court, for good cause shown.

PARTICULAR INJUNCTIVE RELIEF AND DISPOSITION

(46) Defendant is enjoined from utilizing the Installer's Test Battery as part of its Installation hiring process.

(47) Defendant is enjoined from utilizing the Clerical Test Battery as a criterion in promotion from hourly-rated to non-supervisory, salary graded positions.

(48) The Court finds that defendant has not discriminated in making promotions within hourly-rated job groups.

(49) The Court finds that defendant has not discriminated in laying off employees.

(50) The Court defers making any finding with respect to the maternity benefits afforded by defendant to its employees.

(51) The Court orders that plaintiff's allegations of discrimination on the part of defendant in providing training school opportunities or sickness benefits be dismissed.

(52) The Court orders that plaintiff's allegations of harassment of employees asserting Title VII rights be dismissed.

(53) The Court finds that this case does not warrant the assessment of punitive damages against the defendant.

(54) The Court finds that defendant has not discriminated in making promotions within non-supervisory, salary graded job groups.

(55) The Court orders that plaintiffs' allegations of discrimination on the part of defendant in its use of the Shop and Warehouse Test Battery, Shop Test Battery, and Warehouse Test Battery be dismissed.

A. V. B.
United States District Judge

STATUTES AND RULE INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2, provides in pertinent part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5, provides in pertinent part as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-314

OLLIE T. HILL, *et al.*,
Petitioners,

v.

WESTERN ELECTRIC CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent opposes the Petition for a Writ of Certiorari because the decision below correctly applied established principles to the facts of the case, and does not conflict with decisions of other circuit courts.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether, under this Court's decision in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), named plaintiffs who are present and former employees and suffered no discrimination in hiring can represent a class of rejected applicants for employment alleging discrimination in hiring.

Whether, in a case where promotions were uniformly made to more experienced employees and where the parties stipulated that the skills required for promotion were normally gained through experience, Petitioners presented a *prima facie* case of discrimination in promotions by relying solely upon statistical evidence that did not take experience or qualifications into account.

COUNTERSTATEMENT OF THE CASE

This case was brought as a class action, alleging race and sex discrimination in employment, by eight present and former employees of Respondent who worked at two facilities in Arlington, Virginia. None of the eight named plaintiffs had ever been refused employment by Respondent. On October 31, 1975, based in part upon Plaintiffs' express representation that none of them was or had been a rejected applicant, the district court for the Eastern District of Virginia certified a class that excluded applicants for employment. On November 14, 1975, the court *sua sponte* reversed itself and allowed this case to proceed as a class action involving both present and former employees and rejected applicants.[1] In both certification decisions, the district court overruled Respondent's contention that class membership should be limited to those employees whose claims were not barred by the statute of limitations, and certified a class dating back to the effective date of Title VII of the Civil Rights Act of 1964.

[1] The District Court explained its reversal in the following letter to counsel:

> A closer reading of *Barnett* v. *W. T. Grant Co.*, 518 F. 2d 543 (4th Cir. 1975), convinces me that I was in error in my ruling on October 31, 1975, that the class should not include applicants for employment. Counsel drafting the order on the October 31st ruling should certify a class including applicants for employment. I am sorry if this change in ruling has delayed any discovery proceedings.

After trial on the merits, the district court sustained claims of discrimination in hiring and promotion. The trial court found that Respondent's hiring practices had not had a disparate impact upon minorities or females when compared with census statistics for the Washington, D.C. Standard Metropolitan Statistical Area.[2] However, the court found disparate impact in hiring during the entire 1965 to 1975 period by comparing Respondent's hiring percentages with applicant flow statistics for the years 1970-1974.[3] On this basis, the court ordered preferential hiring for all rejected applicants from 1965 to date, and further ordered that Respondent fill all new vacancies in its facilities in accordance with a specified numerical hiring ratio until such time as Respondent's work forces contained percentages of minorities and females equal to their percentages in the applicant pool for the preceding four (4) years.[4]

Plaintiff's sole proof of disparate impact in promotions consisted of a comparison between the minority and female percentage of Respondent's hourly work forces with the number of minorities and females promoted, despite stipulated and uncontroverted evidence that promotion skills were normally gained through experience

[2] Appendix to Petition, at 31a.

[3] These statistics proved that Respondent attracted minority and female applicants far in excess of their expected availability. For example, SMSA availability statistics for blacks, from 1965 to 1974, ranged from 22.5% to 26.5%, while Respondent's black applicant flow from 1970-1974 exceeded 40% for both facilities. Appendix to Petition 30a, 32a. The district court found that Respondent had engaged in affirmative efforts to recruit and hire blacks, Appendix to Petition, at 43a, note 7, and while it recognized that such efforts could have the effect of distorting the applicant pool for a given employer, it found without further explanation or citation that Respondent's efforts did not preclude reliance upon applicant flow statistics. Appendix to Petition, at 33a, note 4.

[4] Appendix to Petition, at 96a-97a, 99a-101a. No specified time limit for such ratio hiring was established.

and that promotions were uniformly allocated to more experienced employees.[5] Once again, the court ordered preferences for persons in the hourly work force who might have suffered discrimination in promotions,[6] added back pay and front pay for all discriminatees,[7] and ordered Respondent to make future promotions on the basis of specified numerical ratios. Although the court's liability finding was premised upon a comparison with the hourly work force rather than applicants for initial hire, its order required promotions made in accordance with the ratios until such time as the percentage of minorities and females in higher level positions equalled the percentage of minorities and females in the applicant pool for hiring for the preceding four (4) years.[8]

The Fourth Circuit reversed virtually all of the district court's findings. As none of the named plantiffs

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[5] Specific evidence on this issue included:

a) The parties' stipulations that the skills and experience required for promotion are normally acquired through experience in hourly and nonsupervisory salaried positions;
b) That from 1965 to the time of trial, promotions in both facilities were uniformly made to more experienced employees, with the result that in the Service Center facility promotees had an average of 15.3 years of experience, while in Installation promotees had an average of 14.8 years of experience;
c) That no employee was promoted to supervisor in the Service Center with less than six years of experience, and no employee was promoted to supervisor in Installation with less than eight years of experience.

While Petitioners correctly state that no specific amount of experience was a prerequisite for promotion (Petition, at 25-26), it is clear that experience was in fact a prime determinant in promotion decisions during the period.

[6] Appendix to Petition, at 95a.

[7] Appendix to Petition, at 92a-95a.

[8] Appendix to Petition, at 98a-100a. Once again, no specified time limit for such promotions was established.

had suffered discrimination in hiring,[9] the Fourth Circuit found that their interests in potentially discriminatory job assignment, transfer or promotion policies were not the same as the interests of rejected applicants in the hiring process. On the basis of this Court's ruling in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977) that named plaintiffs must "possess the same interests and suffer the same injury" as class members they seek to represent, the Fourth Circuit held it was error to allow the named plaintiffs to represent rejected applicants. The Fourth Circuit thus vacated the district court's opinion regarding discrimination in hiring.[10]

The Fourth Circuit further held that plaintiffs had failed to establish a *prima facie* case of discrimination in promotions. The court found that plaintiffs' proof of disparate impact, which consisted solely of a percentage comparison between all minorities and females in the hourly work forces with the percentages of minority and females promoted, was insufficient in light of Respondent's proof that promotions were uniformly made to more experienced employees.[11] In light of the uncontroverted and stipulated evidence on this point, the Fourth Circuit refused to presume that all hourly employees were equally qualified for promotions. As plaintiffs had totally failed to present any statistical comparisons based upon a pool of skilled or experienced hourly employees who were presumptively qualified for

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[9] The Fourth Circuit found that plaintiff Marable's claim of hiring discrimination was totally invalid as there was no clerical vacancy between the time she applied for employment and the date she was hired. Appendix to Petition, at 3a, note 1. A further discussion of Marable's status is found *infra*, text accompanying notes 17-22.

[10] The Fourth Circuit did not have to consider the merits of the district court's findings on discrimination in hiring, or the propriety of the court's remedial decree.

[11] *See* note 5, *supra*.

promotion,[12] the Fourth Circuit held that plaintiffs had failed to prove disparate impact and dismissed the promotion claim.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Fourth Circuit correctly applied *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977) to find that the named plantiffs could not represent rejected applicants. None of the named plaintiffs was refused employment, and thus none of the named plaintiffs suffered the same injury, possessed the same interests, or could be members of a class of rejected applicants. The decision below is in harmony with the only two circuit court decisions since *Rodriguez* dealing with this issue,[13] and is supported by a substantial body of case law establishing that present and former employees may not represent rejected applicants under the commonality, typicality, and adequacy requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

Petitioners' claim that plaintiff Marable was a rejected applicant is completely without merit. Petitioners' present contention is directly contrary to the position they took at the time the class was certified. Moreover, Marable's claim was plainly untimely as she was hired in 1966 but made no complaint of discrimination in employment until 1973. This Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977) establishes

[12] At no time did the Fourth Circuit require plaintiffs to anticipate or prove "what job-related skills would be" (Petition, at 7). The Fourth Circuit merely held that plaintiffs' sole method of proof was insufficient to create a presumption of discrimination as it failed to take experience or job skills into account in any way.

[13] *Scott* v. *University of Delaware*, 19 Fair Empl. Prac. Cas. 1730 (3d Cir. 1979); *Chavez* v. *Tempe Union High School District*, 565 F.2d 1087 (9th Cir. 1977).

that such a moribund claim has no present legal consequences. Finally, even if her claim were to be considered timely, her failure to allege or prove a vacancy precludes her hiring claim from serving as the basis for class representation.

The court below was also correct in refusing to allow the named plaintiffs to raise allegations of sex discrimination at the Installation facility. The Installation and Service Center facilities are distinct and separate employing entities, and neither of the female named plaintiffs was employed in the Installation facility.

The Fourth Circuit's ruling that Petitioners had failed to present a *prima facie* case of discrimination in promotions is also correct and does not conflict with other circuit court rulings. The court below properly considered Respondent's proof that promotions were uniformly made to more experienced employees in the context of Petitioners' proof of disparate impact. For these more highly skilled positions, the Fourth Circuit held that statistical proof that failed to take skills, experience or qualifications into account in any way was insufficient to raise a presumption of illegal conduct. This decision did not require Petitioners to anticipate or prove that they were qualified, but rather to adduce some evidence beyond a mere gross statistical comparison with the entire hourly work force. This ruling is well supported by numerous circuit court decisions requiring plaintiffs to prove that their statistical proof reflects a relevant qualified labor market.

I. THE FOURTH CIRCUIT CORRECTLY HELD THAT PETITIONERS, WHO HAD NOT SUFFERED ANY DISCRIMINATION IN HIRING, COULD NOT REPRESENT REJECTED APPLICANTS.

A. The Fourth Circuit's Decision is in Harmony With This Court's Decision in *East Texas Motor Freight, Inc.* v. *Rodriguez* and With Circuit Court Decisions Interpreting *Rodriguez.*

The Fourth Circuit's decision correctly applies this Court's decision in *East Texas Motor Freight, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977). *Rodriguez* establishes that class representatives must both be part of the class they seek to represent and "possess the same interest and suffer the same injury as the class members." 431 U.S. at 403. In *Rodriguez*, this Court held that the named plaintiffs could not represent a class of applicants for certain driving positions because they were not qualified for such jobs and thus had personally suffered no "injury" from the alleged discriminatory practices. Similarly, in the present case, the Fourth Circuit found that Petitioners, all of whom had been hired and none of whom had suffered discrimination in initial hire, did not possess the "same interest" and had not suffered the "same injury" as rejected applicants alleging a discriminatory refusal to hire. The court therefore correctly concluded that the petitioners were not proper representatives of a class of applicants under the two-part test employed in *Rodriguez*.[14]

Moreover, the Fourth Circuit's decision is consistent with circuit court decisions interpreting *Rodriguez*. Only two other Circuits, the Third and Ninth, have addressed

[14] Petitioners allege that the Fourth Circuit enunciated a *per se* rule based upon its interpretation of *Rodriguez*. No statements to this effect are found in the decision below, which appears to resolve this question on the basis of the record in this case rather than to finally determine a question of law applicable to all class actions.

the issue of employee representation of rejected applicants since this Court's decision in *Rodriguez*,[15] and in both cases the results are consistent with the Fourth Circuit's decision in this case. The Third Circuit in *Scott* v. *University of Delaware*, 19 Fair Empl. Prac. Cas. 1730 (3d Cir. 1979), held that an employee who had not suffered any discrimination in hiring could not properly represent a class of unsuccessful applicants. The court based its decision both on the lack of typicality of plaintiff's claim that he was discharged on the basis of race with the hiring claims of the applicant class, and on inadequacy of representation because the interests of the named plaintiff in continued employment and the interests of the applicant class were in conflict. The court also noted that because the named plaintiff was not discriminated against in initial hiring, he would not satisfy the "same interest, same injury" test of *Rodriguez*.[16]

[15] Neither of the post-*Rodriguez* decisions cited by Petitioners conflicts with the Fourth Circuit's decision. Petitioners cite the Eighth Circuit case of *United States Fidelity & Guaranty Co.* v. *Lord*, 585 F.2d 860 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 1228 (1979), for the proposition that the certification of a class including both applicants and employees did not constitute an abuse of discretion. However, this issue was never even considered by the court. The case was brought to the court on a petition for a writ of mandamus to limit the geographic scope of the class to a single state. The court dealt solely with the geographic scope question; it never reached the employee-applicant issue.

Similar problems are presented by Petitioners' citation of *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978), as reaffirming the holding in *Long* v. *Sapp*, 502 F.2d 34 (5th Cir. 1974), that a former employee could represent a class including unsuccessful applicants. *Long* is cited in *Satterwhite* for the proposition that a named plaintiff's failure on his or her individual claim does not necessarily moot the class action. 578 F.2d at 933, n.8. *Satterwhite's* holding on this point does not conflict with the Fourth Circuit's decision in this case. The Fifth Circuit's further dicta in *Satterwhite* suggesting a narrow interpretation of *Rodriguez* does not present a conflict in the circuits meriting this Court's attention.

[16] 19 Fair Empl. Prac. Cas. at 1738.

Similarly, the Ninth Circuit, in *Chavez* v. *Tempe Union High School District*, 565 F.2d 1087 (9th Cir. 1977), held that an employee who had suffered no discrimination in initial hiring lacked standing in a Title VII case to raise a claim premised on perpetuation of past hiring discrimination. 565 F.2d at 1094, n.10. Again, the court's decision was based upon this Court's decision in *Rodriguez*.[17]

In addition, the Sixth Circuit, in *EEOC* v. *Detroit Edison*, 515 F.2d 301, *vacated and remanded on other grounds*, 431 U.S. 951 (1977), held that current employees could not represent a class of rejected applicants because they could not meet the adequacy requirements of Fed. R. Civ. P. 23(a)(4). The Sixth Circuit anticipated this Court's decision in *Rodriguez* when it concluded that rejected applicants could only be represented by individual plaintiffs who had "interests in common" with the class. 515 F.2d at 311.

The Fourth Circuit's decision is thus in conformity with this Court's decision in *Rodriguez* and with the decisions of the Third, Ninth and Sixth Circuits. The cases cited by the petitioners to support the existence of a conflict between circuits are either inapposite or of no continuing validity in view of *Rodriguez*.

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[17] The 1976 decision on standing cited by petitioners, *Gray* v. *Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976), does not conflict with the Fourth Circuit's decision. The plaintiff in *Gray* achieved standing by alleging a personal work environment injury caused by defendant's hiring practices. Petitioners have alleged no such personal injury, and could not have gained standing even under the standard of *Gray*. 545 F.2d at 175, n.16. Further, *Gray* addressed only the question of Article III standing; the plaintiffs had yet to pass muster under Fed. R. Civ. P. 23. 545 F.2d at 176-77. Finally, the continuing validity of the *Gray* decision is doubtful because it was decided before this Court handed down its decision in *Rodriguez*, and appears to embrace a far broader standing doctrine than enunciated by this Court.

Indeed, in tacit recognition that the Fourth Circuit's interpretation of *Rodriguez* is correct, Petitioners have claimed that one of the named plaintiffs, Marable, was in fact a rejected applicant. This claim is specifically contrary to the position that Petitioners took at the time the class was certified, when they assured the trial judge that none of the named plaintiffs was a rejected applicant. More important, any claim that Marable might make with regard to hiring was completely time-barred. Marable originally applied for employment on April 23, 1966; was hired on May 10, 1966; first filed an employment discrimination charge on May 20, 1973; and filed this lawsuit on May 14, 1975.[18] This Court has ruled in *United Air Lines, Inc.* v. *Evans*,[19] that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."[20] Even had Marable suffered some form of hiring injury, her claim was barred by the statute of limitations and had "no present legal consequences."[21]

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[18] Stipulations, paragraph 221, 224, 231 (Appendix 135-136, 141).

[19] 431 U.S. 553 (1977).

[20] 431 U.S. at 558.

[21] *Id.* In 1966, Title VII required that an administrative charge of discrimination be filed within ninety (90) days of the alleged illegal act, a period that was extended in 1972 to 180 days by Congress in the Equal Employment Opportunity Act. *See Legislative History of the Equal Employment Act of 1972* (Committee Print) at 1846. The appropriate state statute of limitations for purposes of 42 U.S.C. § 1981 requires a lawsuit to be brought within two (2) years of the alleged illegal act. Virginia Code § 8-24 as applied in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir.), *cert. denied sub nom., American Tobacco Co.* v. *Patterson*, 429 U.S. 920 (1976).

Finally, Marable's hiring claim was legally deficient, even if it could have been considered timely, due to her failure to allege or prove the existence of a vacancy. Both the district court (Appendix to Petition at 67a, paragraph 102) and the Fourth Circuit (Appendix to Petition at 3a, note 1) found that Marable had applied for employment as a clerk-typist. Yet as the Fourth Circuit notes (Appendix to Petition, at 3a, note 1), no clerk-typist was hired prior to Marable's hire. This failure to allege or prove a vacancy establishes that Marable neither alleged nor proved a *prima facie* case of discrimination.[22]

In light of the record regarding Marable, Petitioners err completely by characterizing this case as inconsistent with cases holding that a properly certified class action may proceed although the named representative's claim upon which it was based has failed. In this case, there was absolutely no foundation to Marable's claim *ab initio*. No court is required to certify a class on the basis of claims that are clearly untimely and do not even rise to the level of a colorable claim of discrimination.[23]

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[22] *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

[23] Petitioners' further claim that this case is distinguishable from *Rodriguez* in that the hiring claims in this case were pursued to judgment is not persuasive. This Court held, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), that class certification decisions are not subject to interlocutory appeals and must be reviewed only after judgment on the merits. If Petitioners are correct in arguing that juridical invulnerability attaches to class claims upon entry of judgment, there can never be appellate review of the merits of the certification decision. Yet *Coopers & Lybrand, supra*, is "predicated upon the concept that full and effective review is available after a final judgment on the merits" (*Satterwhite* v. *City of Greenville*, 578 F.2d 987, 1000 (5th Cir. 1978)), a concept that Petitioners would prefer to avoid in this case. That full and effective appellate review, which this Court has held available to both plaintiffs and defendants, *Coopers & Lybrand, supra*, 437 U.S. at 476-77, destroys Petitioners' alleged distinction of *Rodriguez*.

B. The Fourth Circuit's Decision is Consistent With Judicial Interpretation of Rule 23 of the Federal Rules of Civil Procedure.

Further support for the Fourth Circuit's decision is found in numerous lower court decisions holding that employees are not proper representatives of rejected applicant classes under the specific Fed. R. Civ. P. 23(a)(2), (3) and (4) requirements of commonality, typicality and adequacy.[24]

The lack of commonality and typicality in the present case is revealed in the divergence between the promotion and job assignment claims of the petitioners and the hiring claims of the class of rejected applicants. The challenge to Respondent's hiring practices raised complex factual and legal issues concerning the impact and validity of tests and other hiring criteria that are totally unrelated to the Petitioners' individual allegations. Petitioners' own statistical comparisons utilize totally different universes for hiring and promotion, again underscoring the dissimilarity of the claims themselves. Petitioners' attempt to characterize the hiring and promotion claims included in the case as aspects of one single employment practice is the very type of over-broad generalization prohibited by *Rodriguez's* mandate of "careful attention" to the specific requirements of Fed. R. Civ. P. 23. 431 U.S. at 405-06.

The representation of rejected applicants by Petitioners also raises serious questions of adequacy of representa-

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[24] *See, e.g., Lightfoot* v. *Gallo Sales Co.*, 15 Fair Empl. Prac. Cas. 615, 619-20 (N.D. Cal. 1977) (holding that plaintiff-employees could not represent a subclass of rejected applicants because they failed to meet the requirements of Rule 23(a)(2) and (3)); *Williams* v. *Wallace Silversmiths, Inc.*, 75 F.R.D. 633, 635 (D. Conn. 1976) (same); *Robbins* v. *O'Brien Corp.*, 14 Fair Empl. Prac. Cas. 934, 935 (N.D. Cal. 1977) (same, on typicality grounds); and *Gill* v. *Monroe County Dept. of Social Services*, 79 F.R.D. 316 (W.D.N.Y. 1978) (same, on adequacy grounds).

tion.[25] A number of courts, including the Third Circuit in *Scott* v. *University of Delaware, supra*, have held that employees are inadequate representatives of rejected applicants because of inherent conflicts over the types of relief sought. Relief to rejected applicants in the form of retroactive seniority, promotion and hiring "preferences," as ordered by the trial court in the present case, could serve to displace the employee class representatives.[26] Moreover, the time span covered by the class in the present case predates each of the Petitioners' initial dates of hire, thus creating a serious risk of conflict.[27] The district court recognized this risk and in its initial certification order the court refused to include rejected applicants in the class, only to erroneously reverse itself thereafter. The Fourth Circuit made no similar error when it ruled the plaintiffs shared no injury or common interests with rejected applicants.

II. THE FOURTH CIRCUIT PROPERLY HELD THAT THE NAMED PLAINTIFFS COULD NOT REPRESENT A CLASS ALLEGING SEX DISCRIMINATION IN THE INSTALLATION FACILITY.

Under *Rodriguez*, the named female plaintiffs could represent a class of women alleging sex discrimination at the Installation facility only if they were members of such a class. The only two named female plaintiffs, Marable and Carter, were not employed at the Installa-

[25] Contrary to Petitioners' assertions, challenges to the adequacy of representation were made in the Fourth Circuit.

[26] In *Scott*, the Third Circuit concluded that the interests of the named representative, a faculty member whose contract was subject to renewal, and the interests of a class of applicants for positions on the faculty, were "necessarily" in conflict. 19 Fair Empl. Prac. Cas. at 1737.

[27] Petitioners also recognize this conflict. In their petition they stress the fact that applicants directly "competed" with the named plaintiff who sought to transfer to another job. (Petition, pp. 8-9.)

tion facility, and on this basis the Fourth Circuit properly held that their employment at the Service Center facility did not allow them to challenge the employment practices of a separate employing entity.

Courts considering the issue have held that class certification must be based upon "[s]uch factors as geographical dispersion, diversity of employment, work activities, or individual class members' characteristics, . . . and decentralized or disuniform administration of personnel policies. . . ." *Wofford* v. *Safeway Stores*, 78 F.R.D. 460 (N.D. Cal. 1978). Thus, federal courts have consistently held that named plaintiffs may not represent employees whose jobs require skills or qualifications markedly different from their own,[28] or whose conditions of employment are different due to membership in a different collective bargaining unit or union local,[29] or who are not subject to a single, uniform personnel policy.[30]

[28] *Lewis* v. *Methodist Hospital*, 17 Empl. Prac. Dec. ¶ 8601 (S.D. Tex. 1978) (licensed vocational nurse could not represent registered nurses); *Webb* v. *Westinghouse Electric Corp.*, 78 F.R.D. 645 (E.D. Pa. 1978) (production and maintenance workers could not represent salaried employees); *Rowinski* v. *Vaughan*, 77 F.R.D. 406 (D.D.C. 1977) (professionals could not represent clericals).

[29] *Buckner* v. *Cameron Iron Workers*, 18 Fair Empl. Prac. Cas. 1482 (S.D. Tex. 1978); *Markey* v. *Tenneco Oil Co.*, 439 F. Supp. 219 (E.D. La. 1977); *Ford* v. *U.S. Steel Corp.*, 17 Fair Empl. Prac. Cas. 940 (N.D. Ala. 1977).

[30] *Rosendaul* v. *Garrett Freightlines*, 19 Fair Empl. Prac. Cas. 881 (D. Idaho 1979); *Aungst* v. *J. C. Penney Co.*, 456 F. Supp. 370 (W.D. Pa. 1978); *Droughn* v. *FMC Corp.*, 74 F.R.D. 639 (E.D. Pa. 1977). *Califano* v. *Yamasaki*, 99 S. Ct. 2545 (1979), which Petitioners contend permits certification of a nationwide class, is simply inapposite. That case did not involve employment discrimination and therefore did not concern itself with the effect of decentralized personnel policies on class certification. Rather, plaintiffs in *Yamasaki* presented only a single issue of law—whether a hearing is required prior to recoupment of Social Security overpayments—"applicable in the same manner to each member of the class." 99 S. Ct. at 2557.

Thus, whether the propriety of the named plaintiffs' representation of a particular class is deemed a matter of standing—as the *Rodriguez* Court's reliance on *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), implies—or rather depends only upon satisfaction of Rule 23's typicality, commonality and adequacy requirements, the presence of the factors listed in *Wofford*, *supra*, may vitiate the "nexus" that must exist between the representatives and the purported class. *E.g.*, *Hannigan* v. *Aydin Corp.*, 76 F.R.D. 502 (E.D. Pa. 1977).[31] The record below demonstrates just such a series of marked differences between the two Western Electric facilities, and therefore the Fourth Circuit was correct in holding that plaintiffs Marable and Carter were not members of a class subject to the employment policies of the Installation facility.

The Installation District is one of three parts of an Installation "Area" headquartered in Towson, Maryland. None of the District's employees (save six administrative employees) work in the Arlington office; unlike the employees of the Service Center, installation work is performed "in the field." Service Center and Installation employees are covered by different collective bargaining agreements; are members of separate union locals, and use separate grievance and arbitration procedures. The

[31] Even before the Court's decision in *Rodriguez*, the lower courts had held the requirements of Rule 23 unsatisfied in cases in which these factors were present. *E.g.*, *Wells* v. *Ramsay, Scarlett and Co.*, 506 F.2d 436 (5th Cir. 1975) (foreman could not represent longshoremen); *Parker* v. *Kroger Co.*, 14 Fair Empl. Prac. Cas. 75 (N.D. Ga. 1976) (bargaining unit members could not represent nonmembers; class limited to geographical "zone"); *Sanday* v. *Carnegie-Mellon University*, 17 Fair Empl. Prac. Cas. 562 (W.D. Pa. 1976) (faculty hiring, salary, promotion, and tenure decisions made by individual department heads and deans). Petitioners do not contend that the Fourth Circuit's decision conflicts with the decisions of any other circuit on this question.

work of the Service Center employees involves assembly, repair, maintenance, or clerical functions; installers must develop sophisticated electronic knowledge and skills. There is no interaction or interdependence between the personnel of the two facilities.

The sole connection between the Service Center and Installation, Washington District, is that the latter rents a small portion of the former's physical plant. However, mere geographical proximity, standing alone, cannot equate the two facilities for purposes of class certification, *Patterson* v. *American Tobacco Co.*, *supra*, especially when the two groups of employees have totally different job duties and are drawn from different labor markets, *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied sub nom.*, *American Tobacco Co.* v. *Russell*, 425 U.S. 935 (1976).[32]

III. THE FOURTH CIRCUIT'S RULING ON DISCRIMINATION IN PROMOTIONS IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND WITH RELEVANT RULINGS OF LOWER COURTS.

A. The Fourth Circuit's Ruling On Promotions Correctly Applies Established Principles Regarding The Burden Of Proof In Employment Discrimination Cases.

Contrary to Petitioners' assertions, the Fourth Circuit neither departed from prior precedent nor imposed an unreasonable burden of proof upon them by ruling that no *prima facie* case of discrimination in promotions was

[32] Indeed, even the district court recognized that the Installation and Service Center facilities were distinct with regard to all issues save initial hiring. Appendix to Petition, at 29a.

presented in this case. Unlike the district court, the Fourth Circuit evaluated all of the evidence in the record—including that offered by Respondent as well as that offered by Petitioners—to determine that Petitioners had not carried their burden of proving that the promotion process had a disparate impact upon minorities and females. In particular, the court below relied heavily upon the following evidence:

1. The parties' stipulations that the skills and experience required for promotion are normally acquired through experience in hourly and non-supervisory salaried positions (App. 115, 118);
2. That from 1965 through the time of trial, promotions in both facilities were uniformly made to more experienced employees, with the result that in the Service Center promotees had an average of 15.3 years of experience, while in Installation promotees had an average of 14.8 years of experience (App. 643, 696);
3. That no employee was promoted to supervisor in the Service Center with less than six years of experience, and no employee was promoted to supervisor in Installation with less than eight years of experience (App. 643, 646).

On the basis of this evidence, the court determined that not all hourly employees could be deemed equally qualified for promotion. The court thus held that Petitioners' proof of disparate impact, which was based exclusively upon a comparison of the total percentage of all minority and female employees in the hourly work force without regard to experience, did not amount to *prima facie* proof of disparate impact.

The Fourth Circuit properly considered Respondent's evidence in determining whether Petitioners had shown a *prima facie* case of disparate impact. This Court has

repeatedly held that plaintiffs bear the burden of proof in employment discrimination cases,[33] and that employers are entitled to attack statistics, and the inferences to be drawn from statistics, offered as evidence of disparate impact. *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 339-41, 360-61; *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 330; *and see Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 337-39 (Rehnquist, J. concurring); *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 314 n.1, 319 n.8 (Stevens, J. dissenting).[34] There can be no doubt that Respondent's evidence was properly considered in the context of Petitioners' *prima facie* case.[35]

Moreover, Respondent's evidence established that the underlying premise of Petitioner's statistical proof—

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[33] *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 576-78 (1978); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-09 (1977); *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 334-41 (1977); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 137, n.14 (1976).

[34] Indeed, Justice Stevens' dissent in *Hazelwood* was based on the employer's failure to supply rebuttal evidence to contradict the government's *prima facie* case.

[35] Numerous lower courts have similarly held that a *prima facie* case must be judged on the basis of the record as a whole, and that an employer's evidence may bear on the existence of *prima facie* proof. *See, e.g., Whack* v. *Peabody & Wind Engineering Co.*, 595 F.2d 190 (3d Cir. 1979); *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1350 (4th Cir. 1976); *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264, 1268-69 (5th Cir. 1978); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Henry* v. *Ford Motor Co.*, 553 F.2d 46, 48-49 (8th Cir. 1977); *Mosby* v. *Webster College*, 563 F.2d 901 (8th Cir. 1977); *Dickerson* v. *United States Steel Corp.*, 439 F. Supp. 55 (E.D. Pa. 1977); *EEOC* v. *duPont Co.*, 445 F. Supp. 223 (D. Del. 1978); *see generally* Schlei and Grossman, *Employment Discrimination*, at 1159-60, 1196 (1976). In light of this pervasive authority, the district court and Judge Lay were guilty, in their words, of a "fundamental misconception" in failing to consider Respondent's evidence in the context of Petitioner's *prima facie* case.

that all hourly employees were equally qualified for promotion—was inaccurate. This Court has repeatedly emphasized that statistical proof must, in cases involving skilled jobs, define the relevant labor market in light of the prerequisites for the job.[36] On this basis, numerous courts have dismissed employment discrimination claims for failure to prove disparate impact where plaintiffs failed to show the proportion of the work force possessing the skills required for the job.[37] In particular, a substantial number of courts, in promotion cases nearly identical to the instant case, have held that plaintiffs are required to supply proof of a sufficiently skilled population upon which to base a comparison. For example, in *EEOC* v. *Chesapeake & Ohio Railway Co., supra, EEOC* v. *United Virginia Bank, supra,* and *Roman* v. *ESB, Inc., supra,* the Fourth Circuit refused to find a *prima facie* case of discrimination in promotions where plaintiffs sup-

[36] *Hazelwood School District* v. *United States, supra,* 433 U.S. at 308-11; *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 339-40 n.20; *Mayor of the City of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620-21 (1974).

[37] *See, e.g., Townsend* v. *Nassau County Medical Center,* 558 F.2d 117 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978); *EEOC* v. *Chesapeake & Ohio Railway Co.,* 557 F.2d 229 (4th Cir. 1978); *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977); *EEOC* v. *United Virginia Bank,* 555 F.2d 403 (4th Cir. 1977); *Roman* v. *ESB, Inc., supra; United States* v. *Jacksonville Terminal, Co.,* 451 F.2d 418 (5th Cir. 1971), *cert. denied sub nom., Brotherhood of Locomotive Engineers* v. *United States,* 406 U.S. 906 (1972); *Miller* v. *Weber,* 577 F.2d 75 (8th Cir. 1978); *Pack* v. *Energy Research and Development Administration,* 566 F.2d 1111 (9th Cir. 1977); *Edmonds* v. *Southern Pacific Transportation Co.,* 19 Fair Empl. Prac. Cas. 1052 (N.D. Cal. 1979); *Movement for Opportunity* v. *Detroit Diesel,* 18 Fair Emp. Prac. Cas. 557 (S.D. Ind. 1978); *Neloms* v. *Southwestern Electric Power Co.,* 440 F. Supp. 1353 (W.D. La. 1977); *Markey* v. *Tenneco Oil Co., supra; Frink* v. *U.S. Navy,* 16 Fair Empl. Prac. Cas. 67 (E.D. Pa. 1977); *Agarwal* v. *Arthur G. McKee & Co.,* 19 Fair Empl. Prac. Cas. 503 (N.D. Cal. 1977); *Croker* v. *Boeing,* 437 F. Supp. 1138 (E.D. Pa. 1977); *EEOC* v. *DuPont Co., supra; Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (S.D. Ohio 1968).

plied no proof that hourly employees were qualified for the positions based on job performance, skill and dependability. Similar decisions are found in the Fifth Circuit,[38] the Ninth Circuit[39] and in numerous district courts.[40]

These cases stand for one central proposition—that where jobs require specialized skills, qualifications or experience, plaintiffs may not rest their *prima facie* case upon statistical proof that fails to take experience and skills into account.[41] Petitioners' entire proof of disparate impact herein rested upon the assumption that all hourly employees were equally qualified, and in light of the pervasive authority quoted above this proof was properly rejected by the Fourth Circuit. As this Court has previously stated, *prima facie* proof of discrimination depends on presentation of evidence justifying, absent further explanation, an inference of illegal conduct.[42]

[38] *United States* v. *Jacksonville Terminal Co., supra,* 451 F.2d at 445-46.

[39] *Pack* v. *Energy Research & Development Administration, supra,* 566 F.2d at 1113.

[40] *Lee* v. *City of Richmond,* 456 F. Supp. 756 (E.D. Va. 1978); *Markey* v. *Tenneco Oil Co., supra; Agarwal* v. *Arthur G. McKee & Co., supra; Croker* v. *Boeing, supra; EEOC* v. *duPont Co., supra.*

[41] Scholarly commentary further supports the decision below. *See, e.g.,* Gwartney, Asher, Haworth & Haworth, *Statistics, The Law and Title VII: An Economist's View,* 54 N.D. Lawyer 633, 644-47 (1979); *Note: Employment Testing: The Aftermath of Griggs* v. *Duke Power Company,* 72 Colum. L. Rev. 900, 911 (1972); *Note: Employment Discrimination: Statistics and Preferences Under Title VII,* 59 Va. L. Rev. 463, 474 (1973).

[42] *Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 576-78. Petitioners' further claim that the decision below conflicts with circuit court authority overturning promotion systems based upon subjective judgments (Petition, at 24) overlooks the central question in those cases. It was not the subjectivity of the procedure that was in issue in those cases, but whether the procedure had a disparate impact upon the employment opportunities of females and minorities. As the Eighth Circuit stated in *Rogers* v. *Interna-*

Here, Petitioners failed to present such proof by failing to compare equally experienced or skilled personnel.

B. The Fourth Circuit Neither Applied An Erroneous Legal Standard Nor Improperly Relied Upon Population Statistics.

Petitioners' claim that the Fourth Circuit improperly applied the burden of proof standards enunciated in *McDonnell-Douglas Corp.* v. *Green, supra,* must fail for two reasons. First, in its opinion the Fourth Circuit never states that it is relying upon the *McDonnell-Douglas* standards; indeed, at no point in its opinion does it ever refer to that case. Petitioners' claim that the court below applied these standards to this case thus rests upon the implications they choose to draw from the Fourth Circuit's ruling, rather than the decision itself.

Second, neither this Court nor the courts of appeals have ever held that the *McDonnell-Douglas* standards are of no relevance in a disparate impact case. In fact, in *Furnco Construction Corp.* v. *Waters, supra,* this Court discussed the *McDonnell-Douglas* standards and their general applicability:

> But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based

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tional Paper Co., 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other issues,* 423 U.S. 809 (1975):

> "[Subjective criteria] are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone."

Thus, only if disparate impact had been found would the decision below conflict with the cases relied upon by Petitioners.

> on a discriminatory criterion illegal under the Act.' *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S., at 358, 97 S.Ct., at 1866. See also *id.,* at 335 n. 15, 97 S.Ct., at 1854.
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> . . . .
>
> . . . A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *See International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S., at 358 n. 44, 97 S.Ct., at 1866. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. at 576-77. This Court's citation of *Teamsters* throughout this discussion implies that the general principle of *McDonnell-Douglas*—that a plaintiff must adduce facts sufficient to support an inference of illegal conduct—is a principle of general applicability. Whether or not a plaintiff must, in every disparate impact case, prove qualifications is not in question in this case. What is in question is whether Petitioners in this case, in light of the stipulated uncontroverted evidence regarding the role of experience in the promotional process, were entitled to a judicial presumption that all hourly employees were equally qualified for promotion. The Fourth Circuit plainly did not err in refusing to indulge Petitioners in this presumption.

Neither did the Fourth Circuit err in relying upon census statistics garnered from the Washington, D.C. Standard Metropolitan Statistical Area (SMSA) in its decision. Petitioners' protestations to the contrary, neither this Court nor the lower courts have ruled that work force statistics are always preferable to SMSA statistics. This Court expressly stated in *Dothard* v. *Rawlinson,*

supra, that "there is no requirement, however, that a statistical showing of disproportionate impact must always be based upon analysis of the characteristics of actual applicants." 433 U.S. at 330. Indeed, in *Dothard*, this Court found that a *prima facie* showing of disparate impact in hiring was properly founded upon SMSA data rather than applicant flow statistics, while in *Hazelwood School District* v. *United States*, *supra*, this Court remanded to the trial court because it was not satisfied that SMSA statistics were an accurate enough measure of actual applicant availability. 433 U.S. at 310-11. As this Court stated in *International Brotherhood of Teamsters* v. *United States*, *supra*:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. See, *e.g.*, *Hester* v. *Southern R. Co.*, 497 F.2d 1374, 1379-1381 (CA5).

431 U.S. at 340. Those surrounding facts and circumstances will, in each case, determine whether applicant flow, SMSA or some other form of data is relevant and appropriate. On this basis, numerous lower courts have referred to SMSA rather than work force statistics in disparate impact cases.[44] While Petitioners cite a number of contrary cases, these cases by no means establish that reliance upon work force statistics is mandatory in all promotion cases.

Moreover, Petitioners' claim that the Fourth Circuit found SMSA statistics more appropriate than work force statistics mischaracterizes the decision below. The Fourth

[44] *See, e.g., Robinson* v. *Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976); *Jones* v. *Tri-County Electric Cooperative*, 512 F.2d 1 (5th Cir. 1975); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978).

Circuit did not rule that SMSA statistics were more appropriate than work force statistics in this case. Rather, the court below properly found Petitioners' statistical proof unpersuasive, and referred to SMSA statistics because they were the only competent statistics remaining in the record. SMSA statistics were highly supportive of Respondent's position as they proved that minorities and females were promoted to supervisory positions in excess of their percentage in such positions in the SMSA. While these statistics supported the Fourth Circuit's refusal to find that Petitioners had proved a *prima facie* case, it was Petitioners' failure to supply adequate statistical proof, rather than a rejection of work force data in favor of SMSA statistics, that formed the *ratio decidendi* below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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